No. 90-509

In the Supreme Court

OF THE

United States

BOB VIEUX; JOYCE VIEUX; DONALD VIEUX, Executor of Zwissig Estate; RALPH POMBO; BOB FRICK; GORDON GRIFFITH; MARIANNE GRIFFITH; KATHLEEN BROCKMAN; NANCY BURR; MIGUEL FRANCO; JOE JESS; PAUL MARCIEL; DON SCULLION, Executor of Greeley Estate; ANTONIO MARTIN; DON BROOKS; EDWARD DEPAOLI; RAY PETERSON; ANTOINETTE EGAN; FERMA CORPORATION, a California corporation; RANCHO ARROYO DE LA ALAMEDA, a general partnership,
Petitioners,

v.

EAST BAY REGIONAL PARK DISTRICT a body politic,

and

COUNTY OF ALAMEDA, a political division of the State of California; SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation; SANTA FE PACIFIC REALTY CORPORATION, a Delaware corporation; ROBERT T. KNOX; and John George,
Respondents.

No. 87-2509
CV-85-3394-WHO

No. 87-15171
CV-85-3394-WHO

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Interstate Commerce Commission approval of a Notice of Exemption, authorizing a short-form abandonment on a railroad right-of-way previously deeded by Act of Congress, constitutes a "decree" under the Public Lands Act (43 USC 912) thus triggering the one-year statutory period for determination of reversionary interests?

2. Whether a railroad, without Interstate Commerce Commission or Congressional approval can convey to a local government, an Act of Congress railroad right-of-way?

3. Whether the "establishment of a highway" provision of the Public Lands Act (43 USC 912) required, under applicable state law (California), compliance with all necessary statutory and environmental reviews for the establishment of a highway, or may be satisfied by the mere act of local government's "paper acquisition" of the railroad right-of-way?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are listed in the caption. Defendant East Bay Regional Park District has since been dismissed from this action. Although the Ninth Circuit issued a consolidated appellate decision, this Petition for Certiorari addresses only the issues raised in action No. 87-15171.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Bob Vieux; Joyce Vieux; Donald Vieux, Executor of Zwissig Estate; Ralph Pombo; Bob Frick; Gordon Griffith, Marianne Griffith; Kathleen Brockman; Nancy Burr; Miguel Franco; Joe Jess; Paul Marciel; Don Scullion, Executor of Greeley Estate; Antonio Martin; Don Brooks; Edward Depaoli; Ray Peterson; Antoinette Egan; Ferma Corporation, a California corporation; Rancho Arroyo De La Alameda, a general partnership, respectfully pray that a Writ of Certiorari be issued to review a judgment of the United States Court of Appeal for the Ninth Circuit.

JURISDICTION

The decision of the Court of Appeal (Appendix A) was issued on June 26, 1990 and is reported at (9th Cir. 1990) ____ F.2d ____. An original opinion was filed on January 10, 1990 (____ F.2d ____) but, following a Petition for Rehearing, was withdrawn on June 26, 1990 (____ F.2d ____) and modified, in part, in the current decision (App. A) issued on that same date (June 26, 1990), which is the subject of this Petition.

The Ninth Circuit Opinion is the only known circuit court opinion addressing in comprehensive form the reversionary provisions of the Public Lands Act (43 USC 912). It is the only circuit opinion which interprets the "decree" and "public highway legally established" provisions of the Act. In addition, it is the *only* reported federal decision to suggest that an Act of Congress railroad grant may be transferred by a railroad to a local government by a quitclaim deed without Interstate Commerce Commission or Congressional approval. This Ninth Circuit opinion impacts every potential reversionary interest in the United States arising from abandonment of former Act of Congress railroad grants.

FEDERAL STATUTORY PROVISION

> "Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad . . . *and use and occupancy of said lands for such purposes has ceased and shall hereafter cease,*

whether by forfeiture or by abandonment *by* said railroad company declared or *decreed by a court of competent jurisdiction, or by Act of Congress,* then thereupon all right, title and interest in the state of the United States in said lands shall, except in such part thereof as may be embraced in the public highway legally established within one year after the *date of said decree* or forfeiture or abandonment *be transferred to and vested in any person . . . successors in title* and interest to whom or to which title the United States may have been or may be granted conveying or purporting to convey the whole of the *legal subdivisions or subdivisions traversed or occupied by such railroad or railroad structures of any kind . . .* ". 43 USC 912 (emphasis added).

STATEMENT OF CASE

Petitioners are all rural landowners who seek declaratory relief under the Public Lands Act (43 USC 912) and damages (5th and 14th Amendments; Federal Civil Rights Act) arising out of violations of their reversionary rights to abandoned Act of Congress railroad rights-of-way.

The subject rights-of-way, consisting of two separate 400 foot wide strips, each approximately 10 miles long, adjoin or bisect the Petitioners' agricultural ranch lands and are almost exclusively derived from former Act of Congress grants held by Southern Pacific Transportation Company ("Southern Pacific").

Respondent Southern Pacific claims historic title as successor to 1862 Act of Congress railroad grants, while the Respondent County of Alameda currently claims title on the sole basis of a quitclaim deed from Southern Pacific.

In August 1982, Southern Pacific filed a short form abandonment application ("Notice of Exemption") with the Interstate Commerce Commission by which it sought approval to abandon its railroad uses of these rights-of-way and simultaneously transfer the railroad use to a different right-of-way. This short form abandonment procedure compares with the more typical full abandonment proceeding where the railroad use is discontinued in its entirety, thus necessitating broader public findings.

In August 1982, the ICC gave public notice of the proposed abandonment, including notice to those who may be interested in acquiring the rights-of-way, for "transportation modes." On September 13, *1982*, following this notice and without receiving *any* expressed public or government interest on a transportation use, the ICC granted approval for this exemption and *specifically approved abandonment* of the railroad use on these rights-of-way.

Three years later in 1985, the County of Alameda (State of California) and Southern Pacific attempted to belatedly implement the Public Lands Act (43 USC 912) by which:

1. The County accepted a quitclaim deed from Southern Pacific;

2. The County simply declared the right-of-way a County road, despite the fact that there were no environmental reviews, designs, hearings, or plans, or actual construction, or implementation of any public highway of any kind. The only act of the County was to accept a paper conveyance (quitclaim deed) from Southern Pacific and name the deed "a road".

Petitioners contend that the County's acquisition of the rights-of-way violated their reversionary interests since, as adjoining landowners, *they had a vested right to the ownership of the rights-of-way on September 13, 1983* since the ICC had issued a decree of abandonment in 1982 and a county highway had not been legally established within one year of that decree.

The Federal District Court entered separate judgments for the Respondents-Defendants in separate hearings (thus precipitating two separate Ninth Circuit appeals from the same case, thereafter consolidated on oral argument) on the basis of a common law examination of abandonment, but failed to address the impact of the ICC decree under the Public Lands Act provisions (43 USC 912). The Ninth Circuit affirmed the District Court's decision for entirely different reasons, (App. A) ruling that the Notice of Exemption (short form abandonment) was not an abandonment deemed a "decree" under the Public Lands Act (43 USC 912), that the highway was legally established by the County under California law, and that the County's acceptance of the rights-of-way through a quitclaim deed from Southern Pacific was valid to

transfer the United States' reversionary interests in the rights-of-way.

The Petitioners contend that the Ninth Circuit's interpretation of the Public Lands Act is a grave distortion of that Act and would effectively allow every city, county, and state within the nation to circumvent the Act's intent and provisions, thereby rendering the reversionary interests under the Public Lands Act a nullity.

REASONS FOR GRANTING THE WRIT

A. Introduction[1]

The purpose of the Public Lands Act was to dispose of the federal government's reversionary interests upon abandonment of Act of Congress rights-of-way, and in the process, establish a streamlined procedure by which the reversionary interests would vest in adjoining landowners unless one limited exception occurred. The *City of Buckley v. Burlington Northern Railroad Corporation* (1986) 723 Pac.Rprtr.2d 43; *Wyoming v. Andrus* (1979) 62 F.2d 1379; *State of Wyoming* (1976) 83 *Id.* 364; *Seminole National of Oklahoma v. U.S.* 492 F.2d 811, 203 Ct.Cl. 637.

The Public Lands Act (43 USC 912) established a very specific test by which the competing reversionary interests (adjoining landowners or local governments) would be resolved for all purposes within *one year from the date of a decree of abandonment.*

In this context, Congress has declared that the abandonment of a railroad use may not occur without approval of the Interstate Commerce Commission, based on a finding that the present or future public convenience and necessity require and permit the abandonment or discontinuance." 49 USC 10903(a).

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[1] Petitioners have previously dismissed the East Bay Regional Park District and hence this Petition does not address those aspects of the Ninth Circuit opinion concerning its involvement.

In *Chicago and Northwestern Transportation Company v. Kalo Brick and Tile Company* (1981) 450 U.S. 311, 67 L.Ed.2d 258, 101 S.Ct. 1124, the Supreme Court confirmed that Congress has *delegated to the* Interstate Commerce Commission the broad power to regulate the abandonment of railroad use and that the authority of the Interstate Commerce Commission "to regulate abandonment was exclusive". *Chicago, supra*, at 267. Moreover, the Supreme Court stated that *the ICC review of abandonment preempted any state consideration of common law questions of abandonment.* The ICC authority and finding on abandonment "is exclusive". *Chicago, supra,* at 265, 267.

In the context of this exclusive ICC regulatory authority on abandonment, Congress adopted a simple procedure by which the future competing reversionary interests upon abandonment were to be resolved.

If a railroad decided to abandon, in part or whole, any of its railroad operations on an Act of Congress right-of-way, then that abandonment under the Public Lands Act (43 USC 912):

1. Must be approved by the Interstate Commerce Commission (Congressional delegation); and

2. Must have one of two competing reversionary interests (the adjoining rural landowners or local government) vested, dependent upon this streamlined test:

A. If a local government legally establishes a highway *within one year of the date of decree,* then the reversionary interests are deemed legally vested in the local government with physical possession transferred after cessation of use; or

B. If the highway is not legally established *within one year of the date of decree (not the date of actual abandonment),* then the reversionary interests are deemed legally vested in the adjoining landowners with physical possession transferred after cessation of use.

The Ninth Circuit, in the only published decision interpreting the Public Lands Act, has established a completely different test which would destroy both the intent and procedure of the Act. In particular, the Ninth Circuit opinion holds as follows:

1. The Interstate Commerce Commission approval of a short form abandonment (Notice of Exemption) is not a decree under the Public Lands Act, apparently distinguishing between a short form abandonment (where the use is transferred to a different line) as opposed to a more routine abandonment (where the use is discontinued in its entirety). *The Ninth Circuit has established this distinction, sua sponte, without any legislative or judicial basis or precedent.*

2. A railroad holding former Act of Congress rights-of-way may dispose of the holding, in its entirety, by a quitclaim deed to a local government without Interstate Commerce Commission or Act of Congress approval.

3. A local government can comply with the "legally established highway" provision of the Public Lands Act, under applicable state law, by the mere acquisition of a quitclaim deed *without any concomitant implementation of state environmental laws to actually establish, construct, and implement a highway. In essence, the Ninth Circuit has ruled that a paper "quitclaim deed" can suffice for the legal establishment of a highway requirement.*

The Ninth Circuit opinion effectively emasculates, and in fact, extinguishes the Public Lands Act, and substitutes common law unilateral conveyances of reversionary interests without any formal approval.

B. The ICC Approval Of Abandonment

The Ninth Circuit opinion seeks to draw a distinction between a short form summary abandonment and a full form abandonment in terms of the "decree" provision of abandonment envisioned by the Public Lands Act. There does not exist any such distinction in the Public Lands Act; it is contrary to a clear understanding of the Act and the role and purpose of the Interstate Commerce Commission. Moreover, the Ninth Circuit finding is without any cited authority.

In relevant part, the Ninth Circuit provides the following analysis, clearly erroneous on its face:

> "Appellants argued that the ICC's notice of exemption was a decree by act of Congress . . . although the Supreme Court

noted the exclusive authority of the ICC to determine whether a carrier could abandon services, it is unclear from the case law whether an exemption from the regular abandonment procedures is a decree of abandonment under § 912. *We hold there is no such decree by a court or an Act of Congress here.*" App. A, p. 6370.

"Here Southern Pacific filed a Notice of Exemption on August 18, 1982 concerning its relocation project with Western Pacific. In its notice the railroad petitioned the ICC pursuant to 49 USC 10505 for exemption from 49 USC § 10903-10907 *to allow it to abandon the lines* in Niles Canyon and Altamont Pass . . . *the exemption in this case was not the requisite degree or Act of Congress as called for by the statute. First, Southern Pacific received an exemption from the regulation not a certificate of abandonment.* This puts any decision by the railroad to abandon its line outside the regulatory scheme of the ICC; *the ICC regulates and approves abandonment . . . the ICC does not determine abandonment . . .* Lastly, *the only remedy for an illegal abandonment that is not approved by the ICC is an injunction brought by the ICC, the US, or state government . . .* thus a railroad could *abandon without any involvement from the ICC* if there is no injunctive action brought and if a court decrees that the railroad has abandoned the line." App. A, p. 6374 (emphasis added).

The Ninth Circuit opinion, stated above, states so many clear errors of law under the Public Lands Act as to render it bizarre.

First, the Public Lands Act does not distinguish, as suggested by the Ninth Circuit, between a formal "certificate of abandonment" as opposed to a short form abandonment under a "notice of exemption." In the normal abandonment proceeding (49 USC 10903), the railroad line is discontinued in its entirety. In a short form abandonment (49 USC 10505), the railroad use, at a particular right-of-way, is discontinued but the railroad's operational use transfers to another line thus alleviating the necessity of fully evaluating the impact to the consumer of total cessation of use in the area. *In either case, the ICC approves the abandon-*

ment. In fact, in this case, the Ninth Circuit acknowledged the effect of the ICC Notice of Exemption (September 13, 1982):

> "The purpose of the transaction is to eliminate redundant parallel trackage and share the cost of the remaining trackage. *Under the proposed relocation project SPT will abandon its line* . . . concurrently, SPT will acquire trackers rights over the parallel WP track . . . *since the relocation project involves not only an abandonment* . . . " App. A (emphasis added).

There is no basis for the Ninth Circuit's artificial distinction that a normal abandonment, through the issuance of a "Certificate of Abandonment", establishes the "decree" envisioned by the Public Lands Act, but that a short form abandonment using the term "Notice of Exemption", having the same effect of allowing the abandonment, does not constitute "a decree" under the Act.

Second, the ICC approval for abandonment reflects Congressional delegation of the responsibility for abandonment approval. *Chicago and Northwestern, supra.* In fact, abandonment of a railroad use may not occur without ICC approval for "No carrier . . . shall abandon all or any portion of a line of railroad . . . unless . . . there has first been . . . from the Commission . . . a permit of such abandonment . . . " (49 USC 10101, et seq.)

Third, the Petitioners themselves have a remedy independent of the United States or ICC remedy, for as vestees under the Public Lands Act (43 USC 912) they have a standing to assert their interests through declaratory relief and damages for conversion of their vested property rights as a de facto taking under the U.S. Constitution (5th and 14th Amendments) and Federal Civil Rights Act (42 USC 1983).

Finally, the Ninth Circuit's discussion of the actual date of physical abandonment is irrelevant. It is true that the ICC does not determine the actual date of abandonment but merely approves the act of abandonment. Yet, the date of "actual cessation in use" is merely the date upon which the transfer of possession to property occurs, not the date that establishes the vested entitlement to the reversionary interests. Otherwise, havoc would occur as the ICC approved abandonment and the competing interests

(local government and adjoining landowners) would not know who had acquired a vested right for 10, 20, or 30 years. The actual cessation of use, as determined in this case to have occurred in 1985, only establishes the date upon which the transfer occurs. The vested right has been established years earlier by the expiration of the one-year period.

The Public Lands Act was intended and does operate as follows:

1. The Interstate Commerce Commission approves in whole or part, abandonment. Its decree (whether a normal certificate of abandonment or notice of exemption), which authorizes the abandonment of railroad use on a railroad right-of-way, commences a one-year vesting period;

2. If a local government legally establishes a highway by the end of that year, it will acquire the legal interest to the rights-of-way; *if not, the adjoining landowners acquire the vested legal interest to the rights-of-way;*

3. Finally, when the abandonment actually physically occurs (cessation of use), whether a year or ten years from then, the future reversionary interest would have already been determined and will take effect upon the physical cessation. *However, the actual physical cessation of use has nothing to do with the vested reversionary interests which are finally resolved one year after an ICC decree ("date of decree") approving abandonment.*

In this case, the ICC's approval of abandonment occurred in September, 1982. The parties agree that no step was taken to establish a highway until 1985. Accordingly, the Petitioners have vested reversionary rights, as a matter of law. The Ninth Circuit held against the Petitioners based upon an arbitrary finding that an ICC approval of abandonment in the long form is a "decree" under the Public Lands Act, but an abandonment in the short form, is not a decree. There is no basis in the legislative history or case law to this distinction without a difference.

C. Invalid Quit Claim Conveyance

The Ninth Circuit held that Southern Pacific had appropriately transferred its rights-of-way to the County extinguishing all of the

"Appellants' reversionary rights. We have found that these reversionary rights were extinguished in April 1985, when Southern Pacific conveyed the rights-of-way to the County and when the County legally established a public highway. This disposes of all other issues in this case against these defendants". App. A

That conclusion is a total contradiction on the face of the decision which establishes a binding federal circuit precedent that a railroad may transfer an Act of Congress grant unilaterally by a quit-claim deed, thus effectively rendering the Public Lands Act a nullity.

First, since the Ninth Circuit concluded that there was not a decree of abandonment under the Public Lands Act, *then there remains no authority by which a railroad can transfer or convey an Act of Congress rights-of-way to a local government or private property by unilateral quitclaim deed.* The Public Lands Act provides that railroad companies may not deed Act of Congress grants resulting in a diminution of the right-of-way less than 100 feet:

> "All railroad companies to which grants for rights-of-way to the public lands have been made by Congress . . . are authorized to convey to any state, county, or municipality any portion of such right-of-way to be used as a public highway or street: *provided that no such conveyance shall have the effect that diminish the right-of-way that such railroad company to less than 50 ft. on each side of the center of the main track* of the railroad as now established and maintained." 43 USC 913 (emphasis added).

Accordingly, through the Public Lands Act, Congress authorized minor conveyances of surplus land on the flanks of railroad rights-of-way but did not vest in the railroad companies the right to divest itself of the underlying reversionary interest held by the United States in such a manner as to diminish or curtail the railroad use. First, a railroad may not relinquish railroad use without ICC approval (49 USC 10903(a)). Second, where the ICC had acted on an abandonment request, that action is exclusive and final (*Chicago and Northwestern, supra*), and triggers the vested reversionary rights under 43 USC 912. Third, the

rights-of-way are congressional grants for limited uses which cannot be conveyed away without authority. 43 USC 912, 913 *Fourth, congressional intent has established a preferred reversion to the subdivided landowners where the one year vesting test for a highway has not been met. Wyoming v. Andrus* (1979) 62 F.2d 1379; *Seminole National of Oklahoma v. U.S.* 492 F.2d 811, 203 Ct.Cl. 637.

D. Legal Establishment Of A Highway

The phrase "public highway legally established" under the Public Lands Act (43 USC 912) must be based on the state law requirements for a legally established highway. *Standage Ventures, Inc. v. Arizona* (9th Cir. 1974) 499 F.2d 248, 250. In this case, the Ninth Circuit established principles wholly contrary to California state law ruling that the mere paper act of accepting a quitclaim of the rights-of-way as a road operates to create a county highway under California law, citing *Watson v. Greeley* (1924) 69 C.A. 643. The Ninth Circuit has stated under California law, *"The action of the grant and acceptance of the right-of-way constitutes a dedication of the strip for county road purposes"*. On that basis, the Ninth Circuit ruled that since Southern Pacific granted these rights-of-way to the County by quitclaim deed when the County "placed them into the County's highway system to be used for highway and/or transportation related facilities purposes thereafter", it met the requirement of a legally established highway under California law. The Ninth Circuit ignores the constraints of the contemporary California Environmental Quality Act of 1970 (CEQA), California Public Resources Code § 21000-21165. That comprehensive act establishes an exhaustive study and analysis necessary as a prerequisite to the implementation of any government project and, most certainly, a 400 foot wide 20-mile public highway.

The Ninth Circuit found that the County did not adopt an environmental review for the creation of a highway but only a negative declaration stating that the "granting and acceptance of the rights-of-way" would not establish an environmental effect because the County was "prepared to adopt more specific plans for construction projects" in the future. On its face, that finding violates the California Environmental Quality Act. The Petition-

ers urge that a local government may not distort the clear meaning of the "legally establish a highway" provision by merely engaging in a review for the paper acquisition of the land, while postponing any decision that the highway will ever occur in the future. The Ninth Circuit ignored the District Court's own finding that the environmental review by the County was not for the legal establishment of a highway, but for the mere act of taking the property:

> "A negative declaration was prepared in connection with the intended acquisition of Southern Pacific's rights-of-way and the incorporation of those rights-of-way into the County's highway system, *not in connection with the establishment of a highway as a highway.*" C.R. 227, E.R. 105, Opinion p. 7 (emphasis added).

Finally, the District Court had made a prior finding that the County "did not comply with the California Brown Act disclosure requirement set forth in Government Code § 54957.5" by failing and refusing to disclose to the public, in advance, the contents of its transaction with Southern Pacific. This finding constitutes a violation of the California Environmental Quality Act which requires full disclosure of environmental assessments before any approval can be given under its constraints. Public Resources Code § 21092; *Plaggmier v. San Jose* 101 C.A.3d 842.

In summary, the Ninth Circuit has ruled that under California law a local government may "legally establish a highway" by the mere act of accepting the rights-of-way but was not required to actually engage in any real assessment or approval for the construction, implementation, design, or approval of a highway. In effect, a local government can make a mockery, as was done here, of the Public Lands Act by merely declaring a landholding "a highway", but engage in no steps of any kind, to design, approve, implement, or environmentally assess a highway; in short, it can simply land-bank the property regardless of its future contemplated use.

CONCLUSION

The Ninth Circuit opinion is the only known published circuit opinion interpreting these reversionary interest provisions under the Public Lands Act. The opinion renders the Act a nullity, the one-year vesting test irrelevant, while it simultaneously authorizes unilateral quitclaim conveyances by railroads of federal reversionary interests.

Petitioners pray that this Writ of Certiorari be granted.

Dated: September 17, 1990.

GUGHEMETTI & SPANGENBERG
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By: JOSEPH M. GUGHEMETTI
Counsel of Record
Attorneys for Petitioners

APPENDIX A

OPINION, CALIFORNIA COURT OF APPEAL,

NINTH CIRCUIT

FILED JUNE 26, 1990

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Plaintiffs-Appellants,

v.

EAST BAY REGIONAL PARK DISTRICT, a body politic,

Defendant-Appellee.

No. 87-2509

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and

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Defendants-Appellees.

No. 87-15171

D.C. No. CV-85-3394-WHO

ORDER AND OPINION

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, Jr., District Judge, Presiding

Argued and Submitted
December 15, 1988—San Francisco, California

Opinion Filed January 10, 1990
Opinion Withdrawn June 26, 1990
Filed June 26, 1990

Before: Warren J. Ferguson, Melvin Brunetti and Edward Leavy, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Railroads/Real Property

Affirming in part, reversing in part and remanding a judgment of the district court, the court of appeals held that the Interstate Commerce Commission's Notice of Exemption from railroad right of way abandonment proceedings does not satisfy the "Act of Congress" decree required for abandonment.

The court withdrew its opinion filed January 10, 1990. The petition for rehearing was denied and the suggestion for a rehearing en banc was rejected. In October of 1981, appellee Southern Pacific Transportation Company began a several-year process of consolidating its tracks with Western Pacific's parallel tracks in the same area. To facilitate this project, Southern Pacific filed a Notice of Exemption pursuant to 49 U.S.C. § 10505 (1982) from abandonment proceedings with the I.C.C., asking to be excused from the regular procedures due to the insubstantial nature of the transaction and the minimal impact the changes would have on railroad employees, customers, and the amount of transportation in the area. The exemption application stated that SPT would not exer-

cise its abandonment exemption unless and until the SPT-WP trackage rights agreement had been approved by the I.C.C. In 1982, the I.C.C. published a Notice of Exemption. Because storms in the winter of 1983 damaged part of the tracks, Southern Pacific thereafter used portions of that track for storage.

Appellee Alameda County and Southern Pacific entered into an agreement in 1985 which provided that Southern Pacific quitclaim the Niles Canyon and Altamont Pass rights of way to Alameda County. In exchange, the County agreed to place the property into the County's highway system and agreed to grant to the railroad a fiber optic cable and a pipeline easement along, over, and under the property. The railroad continued to use the rights of way through the summer of 1985, but removed the rails, ties, and gravel between the summers of 1985 and 1986. Appellant rural landowners, whose properties adjoin or are bisected by railroad rights of way located along Niles Canyon and Altamont Passs, brought suit, contending that the railroad abandoned its rights of way and that the reversionary rights should fall to them. The district court found that there was no abandonment, and finding that issue dispositive of all the other issues, rendered judgment in favor of the defendants.

[1] Appellant landowners argued that the I.C.C. exemption was a decree by an "Act of Congress," and that no other test needed to be met, thus triggering landowners' reversionary rights under 42 U.S.C. § 912. Appellants contended that they became entitled to reversionary rights on September 13, 1982, when the I.C.C. approved the railroad's relocation onto Western Pacific's trackage and the abandonment of its lines at Niles Canyon and Altamont Pass. [2] The court adopted the test formulated in *Idaho v. Oregon Short Line R. R. Co.*, 617 F. Supp. 213 (D. Idaho 1985), for the interpretation of section 912. For reversionary rights to vest, the railroad must cease use and occupancy of the rights of way and abandonment must be declared or decreed by a court of competent

jurisdiction or a congressional act. Under the exceptions clause, non-vested reversionary rights can be extinguished if a public highway is legally established within one year of a decree or forfeiture or abandonment. [3] Under 49 U.S.C. section 10505, the I.C.C. has authority to grant exemptions from the abandonment process. [4] However, the exemption in this case was not the requisite decree or Act of Congress as called for by the statute. The I.C.C. regulations and procedures determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred. [5] Even though the court determined that the second prong of *Idaho II* had not been satisfied, the court stated that the appellants could still have non-vested reversionary rights under the first prong, triggered by abandonment of use and occupancy of the rights of way by the railroad. [6] The district court found that Southern Pacific's use and occupancy did not cease until April of 1985 and perhaps as late as August of 1985 when the railroad ceased to use the tracks for training exercises. [7] Even under common law principles, the district court found the physical acts of the railroad showed an intent not to abandon until April of 1985 as did the fact that the railroad quitclaimed the rights of way to the County. Conveyance of property and abandonment of property are not consistent actions.

[8] Having accepted the district court's finding that abandonment did not occur until April of 1985, the court then had to make a determination as to whether the County legally established a public highway which would extinguish the appellants' non-vested reversionary rights under the exceptions clause. [9] State law determines what is a public highway legally established for the purposes of federal land grant statutes. Under California common law, where a county is granted and accepts a right of way to be used exclusively for a county road, the acceptance of the grant operates to establish the right of way as a county highway. Southern Pacific granted these rights of way to the County in its agreement of

April 23, 1985, and the County accepted these grants and embraced them as part of the County system of highways when it passed the County Board resolutions. [10] The court affirmed the district court's opinion regarding the Act of Congress grants, but reversed and remanded for further proceedings regarding the private land grants.

COUNSEL

Joseph M. Gughemetti, Joseph M. Gughemetti, A Professional Corporation, San Mateo, California, for the plaintiffs-appellants.

Les A. Hausrath, Wendel, Rosen, Black, Dean & Levitan, Oakland, California, for the defendant-appellee East Bay Regional Park District.

John R. Reese, McCutchen Doyle Brown & Enersen, San Francisco, California, for the defendants-appellees County of Alameda, Southern Pacific Transportation Company, Santa Fe Pacific Realty Corporation, Robert T. Knox, and John George.

ORDER

The opinion filed January 10, 1990 is withdrawn.

The panel voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

OPINION

BRUNETTI, Circuit Judge:

I.

BACKGROUND

A. Overview.

This case is a consolidation of two appeals. Appellants are rural landowners whose properties adjoin or are bisected by railroad rights of way located along Niles Canyon and Altamont Pass in Alameda County, California ("landowners"). Appellees are the County of Alameda, two members of the County's Board of Supervisors ("County"), Southern Pacific Transportation Company, Santa Fe Pacific Realty Corporation ("Southern Pacific") and the East Bay Regional Park District ("Park District"). Appellants contend that the railroad abandoned its rights of way and the reversionary rights should fall to them. The district court first granted summary judgment in favor of East Bay Regional Park District and appellants appealed in No. 87-2509. The district court then tried only the issue of abandonment relating to the remaining defendants. The district court found no abandonment and, finding that issue dispositive of all other issues, rendered judgment in favor of the remaining defendants. Appellants appealed in action No. 87-15171.

B. Standard of Review.

The courts of appeals review a district court's granting of summary judgment de novo. *National Basketball Ass'n v.*

SDC Basketball Club, 815 F.2d 562, 565 (9th Cir.), *cert. dismissed*, 108 S. Ct. 362 (1987). All "evidence and factual inferences" are reviewed in the light most favorable to the nonmoving party. *State of Alaska v. United States*, 754 F.2d 851, 853 (9th Cir.), *cert. denied*, 474 U.S. 968 (1985). Summary judgment must be upheld if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.*

The district court found that whether Southern Pacific had abandoned the right of way and if so, when the abandonment occurred was an issue of fact. The district court's findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard will be given to the opportunity of the district court to judge the credibility of the witnesses. Fed. R. Civ. P. 52(a). A district court's determination of questions of mixed law and fact that implicate constitutional rights are reviewed de novo. *Id.*

C. Factual Background.

Southern Pacific's predecessors, Central Pacific Railway Company and Central Pacific Railroad Company, acquired the rights of way involved in this case as part of the federal land grants made under the Acts of July 1, 1862 (12 Stat. 489) and July 3, 1864 (13 Stat. 356). *Central Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 465 (1932). The property interest that the railroads received before 1871 has been referred to as a "limited fee, with right of reverter." *Idaho v. Oregon Short Line R. R. Co. (Idaho I)*, 617 F. Supp. 207, 210-12 (D. Idaho 1985). After 1871, the government granted the railroads a lesser interest in the property, often referred to as an exclusive use easement. *See United States v. Union Pac. R. R. Co.*, 353 U.S. 112, 119 (1957); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 273-76 (1942). The railroads have used these rights of way continuously until the dispute between the parties here arose.

Beginning in October, 1981, Southern Pacific began a several-year process of consolidating its tracks with Western Pacific Railroad's parallel tracks in the same area. The two railroads signed an agreement on October 12, 1981. To facilitate this project, Southern Pacific filed a Notice of Exemption pursuant to 49 U.S.C. § 10505 (1982)[1] from abandonment proceedings with the Interstate Commerce Commission ("I.C.C."), asking to be excused from the regular procedures due to the insubstantial nature of the transaction and the minimal impact the changes would have on railroad employees, customers and the amount of transportation in the area. 49 U.S.C. § 10903 (1982 & Supp. II 1984). The exemption application states in relevant part that:

> SPT would not exercise its abandonment exemption authority, if granted, *until and unless* the SPT-WP [Southern Pacific-Western Pacific] trackage rights agreement had been approved by the Commission.

(Emphasis added.) On September 13, 1982, the I.C.C. published a Notice of Exemption which states in relevant part:

> SOUTHERN PACIFIC TRANSPORTATION COMPANY—ABANDONMENT AND ACQUISITION OF TRACKAGE RIGHTS OVER THE WESTERN PACIFIC RAILROAD COMPANY
>
> The purpose of the transaction is to eliminate redundant parallel trackage and share the costs of the remaining trackage. Under the proposed relocation project SPT *will abandon* its line of railroad from milepost 29.09 at Niles, CA, to milepost 66.5

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[1]Section 10505 excepts compliance with provisions of 49 U.S.C. §§ 10903-10907 (1982 & Supp. II 1984), when the provisions are (1) not necessary to carry out transportation policy, and (2) either (a) the transaction or service is of limited scope or (b) the application of provisions are not needed to protect shippers from the abuse of market power.

> near Tracy in Alameda and San Joaquin, CA (Niles line). *Concurrently,* SPT will acquire trackage rights over the parallel WP track which will allow SPT to operate between Niles and Lathorp, CA. . . .
>
> As a condition to the use or exemption, SPT has proposed that any employees affected by the transaction be protected by the conditions set forth in *Oregon Short Line*. . . .Since the relocation project involves not only an abandonment but a trackage rights transaction, we must also impose the conditions set forth in *Norfolk and Wester Ry Co.* (citations omitted). Together these conditions satisfy the statutory requirements of 48 U.S.C. 10505(g)(2).

(Emphasis added.) *See* 49 C.F.R. 1152.50(d)(3) (1988). In the winter of 1983, storms damaged parts of the track in Southern Pacific rights of way; thereafter Southern Pacific used portions of that track for storage.

Alameda County and Southern Pacific entered an agreement transferring the rights of way to the County in April, 1985. The County Board of Supervisors ratified this agreement on April 23, 1985. The agreement provided that Southern Pacific quitclaim the Niles Canyon and Altamont Pass rights of way to Alameda County. In exchange, the County agreed to place the property into the County's highway system to be used for highway and/or transportation related facilities to comply with 43 U.S.C. § 912 (1982). The County also agreed to grant to the railroad a fiber optic cable easement and a pipeline easement along, over, and under those portions of the Niles Canyon property, and a fiber optic cable easement along, over and under the Altamont Pass property. The County promised to indemnify the railroad against any loss of the easement and to provide another easement should this one be lost. The County assumed liability for all drainage facilities, culverts, structures, bridges and tunnels including

liability for their removal. The railroad retained a license to use the property as a training ground through July, 1985 and to enter the property within a year following this agreement to remove any rails, ties and gravel. The railroad retained liability as to these activities. The railroad continued to use the rights of way through the summer of 1985, when they completed consolidation with Western Pacific. For example, the railroad used the rights of way for training purposes and storage of railroad cars, and continued to classify the rights of way as operating property, and paid taxes on them. *Vieux v. County of Alameda*, 695 F. Supp. 1023, 1030-31 (N.D. Cal. 1987). Southern Pacific removed the rails, ties and gravel between the summers of 1985 and 1986. *Id.* at 1032.

In order to comply with the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code § 21000-21165 (West 1986 & Supp. 1989), on April 12, 1985, the County published a notice of its intention to adopt a Negative Declaration. *See* Cal. Pub. Res. Code § 21092 (West 1986). This notice stated that the Negative Declaration could be reviewed at the County Public Works Agency. The Board of Supervisors adopted the Negative Declaration before approval of the agreement with Southern Pacific. The Director of Public Works found that the acquisition of the donated land and the grant of the easements would cause no substantial adverse change in the environment because the County contemplated no construction at the time. The County did not hold any public hearings on either the agreement before it was executed or on its environmental impact.

The Park District's interest and involvement in the Niles Canyon[2] area stems from 1973, when the first portion of the Alameda County Creek Regional Trail was completed. In 1976, the Park District Board of Directors (the Board)

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[2]The rights of way in the Altamont Pass area are not within the jurisdictional boundaries of the Park District, and it has never sought to develop recreational trails there.

adopted a trail plan which included the Niles Canyon area. Subsequently the Board decided to propose development of a recreational trail in the Niles Canyon Corridor and a study and environmental impact report (EIR) were prepared and circulated in 1979. The Board accepted a final proposal and EIR on the area in February, 1980. The Park District at this time neither owned nor held any real property interests in the Niles Canyon area. During 1980 and 1981, the Park District made contacts with Southern Pacific to discuss use of the area for recreational trail purposes. The Park District has never acquired an interest or entered into an agreement with Southern Pacific concerning the proposed trail and Niles Canyon area. In 1984, the Park District attempted to have legislation passed by Congress transferring Southern Pacific's interest in the rights of way to the Park District for recreational uses. This proposal died in committee. Also during 1984, Southern Pacific approached the adjoining landowners (appellants) to negotiate a fiber optics easement on each property in exchange for conveying the property or abandoning it.

After their initial efforts to obtain rights to put a trail through Niles Canyon, the Park District learned that Southern Pacific was considering a possible transfer to Alameda County. The Park District expressed its interest to both the railroad and to the County in obtaining a license for trail purposes. Southern Pacific indicated to the Park District that several impediments prevented the railroad from conveying an interest to the Park District. For example, in the absence of congressional approval of a conveyance as provided in 43 U.S.C. § 912, the rights of way to be abandoned could only be conveyed to a state, county or municipality for use as a "public highway or street." 43 U.S.C. §§ 912, 913 (1982). The Park District was not an entity to whom the transfer could be made and the trail was not a "public highway or street." The railroad also wanted an easement for a fiber optics cable in exchange for the rights of way. The Park District was not a party to the County's agreement with Southern Pacific nor did it participate in the negotiations which formed it. The

Park District at this time holds no actual or proposed real property interest in the rights of way, nor did it reach any agreement with Alameda County concerning the rights of way. There has been no construction on the rights of way.

D. Posture of the Case.

Appellants' first amended complaint dated May 21, 1985, alleged violations of 42 U.S.C. §§ 1983 and 1985 (1982) (Federal Civil Rights Act), 43 U.S.C. § 912 (Public Lands Act), 47 U.S.C.A. § 151-613 (1962 & Supp. 1989) (Communications Act of 1934) and sought damages and declaratory relief. *Vieux*, 695 F. Supp. at 1024. Appellants also moved for a writ of mandate July 11, 1985, under Cal. Civ. Proc. §§ 1085 and 1094.5 (allowing for review of administrative orders to compel or enjoin acts); a declaration of quiet title under federal and state law; damages against the County Supervisors for waste of, and injury to, taxpayers' assets, property, and funds under Cal. Civ. Proc. § 526a; declaratory and injunctive relief; and attorneys' fees under 42 U.S.C. § 1988 (1982), Cal. Civ. Proc. § 1021.5 (1986) and Cal. Gov. Code § 54960.5 (1983) (Brown Act). *Vieux* at 1024-25. Appellees then moved to dismiss the action. The district court denied both appellants' petition for writ of mandamus and appellees' motion. The district court bifurcated the action into a trial on the liability and title questions and then a trial on damages if liability existed. After extensive discovery, all defendants moved for summary judgment; the district court dismissed the Park District from the action but denied the motion for summary judgment as to the other defendants. Because appellants had conceded that certain causes of action no longer existed against the Park District, the court in its Memorandum and Order of January 29, 1987 discussed only the causes of action against the Park District under 28 U.S.C. § 1983 and the quiet title under federal and state law. The court found that plaintiffs-appellants had failed to meet their burden under Fed. R. Civ. P. 56(e) and *Celotex v. Catrett*, 477 U.S. 317 (1986), in opposing the Park District's motion for summary

judgment. The court also found that the quiet title actions were not ripe because the Park District had no present interest in the rights of way. Appellants appealed that decision in Appeal No. 87-2509.

Before trial, the district court dismissed the § 1985 action against all defendants except the County, dismissed the Writ of Mandate, and appellants' conceded their claim under the Cable Communications Act was no longer applicable. *Vieux* at 1025. The district court found that appellants had raised genuine issues of fact as to whether the railroad had abandoned the right of way and set that issue for trial. In its opinion and order of September 29, 1987, the district court found for defendants on all issues, *Vieux*, 695 F. Supp. 1023, finding no abandonment and that this issue was dispositive of all others. *Id.* at 1032-33. The district court entered judgment on November 30, 1987 in favor of all remaining defendants and subsequently denied appellants' motion for reconsideration. Appellants appealed in Appeal No. 87-15171, which was consolidated with No. 87-2509.

II.

DISCUSSION

A. Reversionary Rights Under § 912

In 1922, Congress passed 43 U.S.C. § 912 (Disposition of Abandoned Railroad Grants) as part of the Public Lands Act to ensure that railroad rights of way would continue to be used for public transportation purposes. *Idaho I* at 212-13. Although the U.S. Supreme Court has not addressed whether the change in 1871 in the nature of the grants, from "limited fee with right of reverter" to "exclusive easement," affects the application of § 912, we agree with the district court's Memorandum and Order of March 2, 1987, in that the statute applies to grants both before and after 1871. *See Idaho I* at

212-13; *Wyoming v. Andrus*, 602 F.2d 1379, 1382-83 (10th Cir. 1979).

Section 912 in pertinent part provides:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad . . . and *use and occupancy* of said lands for such purposes *has ceased* or shall hereafter cease, . . . *by abandonment* by said railroad company *declared or decreed by a court of competent jurisdiction or by Act of Congress*, then and thereupon all right, title interest, and estate of the United States in said lands shall, *except* such part thereof *as may be embraced in a public highway legally established within one year* after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted. . . .

43 U.S.C. § 912 (emphasis added).

[1] Appellant landowners argue that the I.C.C. exemption was a decree by an "Act of Congress" that the railroad had abandoned their rights of way, and that no other test needs to be met, thus triggering landowners' reversionary rights under § 912. Under appellants' theory, they became entitled to reversionary land interests in the rights of way when on September 13, 1982, the I.C.C. approved the railroad's relocation onto Western Pacific trackage and the abandonment of its lines at Niles and Altamont Pass. *Vieux* at 1025. They further claim that the establishment of a highway by the County does not save the rights of way from reverting, because if the abandonment occurred in 1982, the highway would have been established in excess of one year after abandonment. Appellees, on the other hand, maintain that the I.C.C.

"Notice of Exemption" was not a decree by an "Act of Congress" and that no abandonment had occurred, thus appellants' rights were never triggered under § 912. Appellees also maintain that when the railroad quitclaimed the rights of way to the County for the establishment of a public highway, this action extinguished any claim appellants may have had to the rights of way, thus disposing of the remaining causes of action. *Id.*

After the district court dismissed the Park district from the action, it determined five claims for relief remained for trial: 1) under the Public Lands Act (43 U.S.C. § 912); 2) under the Federal Civil Rights Act (42 U.S.C. § 1983); 3) the quiet title action; 4) the taxpayers' suit; 5) declaratory and injunctive relief. The district court concluded that the issue of abandonment under the Public Lands Act would be dispositive of all other issues, because without abandonment, plaintiffs had no interest in the rights of way. If plaintiffs had no interest in the land and without abandonment had no right or interest to assert, then they would have no standing for the civil rights, quiet title or other causes of action.

The district court tried the issue of abandonment with evidence in the form of declarations and exhibits. The district court, noting the dearth of case law construing 43 U.S.C. § 912 and the issue of abandonment, adopted a test formulated by Chief Judge Callister of the U.S. District Court in Idaho. *Vieux* at 1027; *Idaho v. Oregon Short Line R. R. Co.* (*Idaho II*), 617 F. Supp. 213, 216 (D. Idaho, 1985). First, the court determined that 43 U.S.C. § 912 applied to the grants on the property in dispute here. *See Idaho I*, 617 F. Supp. at 212. Second, the district court stated that, under § 912, the test for abandonment is (a) "that 'use and occupancy' of the railroad right of way for railroad purposes must cease in order for abandonment to occur" *and* (b) there must be "a decree by a court or a congressional act that abandonment has occurred." *Idaho II*, 617 F. Supp. at 216, 218; *Vieux*, 695 F. Supp. at 1028. Last, in interpreting the statute, the district

court looked first to the "plain and apparent meaning" of the terms of the statute and then turned to the common law principles of abandonment for guidance. *Vieux*, 695 F. Supp. at 1027-28; *Idaho II*, 617 F. Supp. at 217.

The district court found that if there was abandonment, it occurred in April, 1985 or afterwards. The district court further found that the County established a public highway within one year of that date, and

> [t]hus, neither the exception nor the rule set forth in § 912 applies, and plaintiffs were not, and are not entitled to any reversionary right, title, interest, or estate in the rights-of-way.

Vieux at 1032. We affirm the district court but find that the exception to § 912 does apply and cuts off any interest the landowners may have had in the rights of way.

[2] The interpretation of 43 U.S.C. § 912 is a question of first impression for this circuit. We adopt the test formulated in *Idaho II* and used by the district court below for the interpretation of § 912. In order for reversionary rights to vest under § 912, the railroad must 1) cease "use and occupancy" of the rights of way *and* 2) abandonment must be "declared or decreed" by a court of competent jurisdiction or a congressional act. *Idaho II*, 617 F. Supp. at 216, 218. Those vested reversionary rights are subject to divestment under the Section 912 "exceptions" clause which provides that [declared or decreed] abandoned rights of way vest in the reversionary landowners "except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree *or* forfeiture *or* abandonment. . . ." 43 U.S.C. § 912 (emphasis added). Under the exceptions clause, non-vested reversionary rights can be extinguished if a public highway is legally established within one year of a decree of abandonment or forfeiture or abandonment.

We will first address the question of whether there was an "Act of Congress" and determine whether there was a cessation of use and occupancy by the railroad. Then, we will look to the exceptions clause to analyze the County procedures in establishing a legal highway.

1. Decree by a Court or Act of Congress.

Appellants argue that the I.C.C.'s Notice of Exemption was a decree by an "Act of Congress." They cite *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) which held that Congress gave the I.C.C. the exclusive authority to regulate and determine a carrier's decision to abandon its lines and cease it services as "critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." *Id.* at 321. The U.S. Supreme Court further emphasized that

> The breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial interference with the agency's work. . . .Congress granted to the Commission plenary authority to regulate. . .rail carriers' cessations of service on their lines. And at least as to abandonments, *this authority is exclusive.*

Id. at 321-23 (emphasis added). Although the Supreme Court noted the exclusive authority of the I.C.C. to determine whether a carrier could abandon services, it is unclear from the case law whether an exemption from the regular abandonment procedures is a decree of abandonment under § 912. We hold that there was no such decree by a court or an Act of Congress here.

a. I.C.C. Exemption from Abandonment

The Staggers Act sets forth a comprehensive scheme of procedures and standards for abandonments of rail lines. *Illinois*

Commerce Comm'n v. I.C.C., 787 F.2d 616, 621 (D.C. Cir. 1986). A railroad may abandon part of a rail line or transfer a rail line only if the I.C.C. "finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance." 49 U.S.C. § 10903(a); *Railway Labor Executives' Ass'n v. I.C.C.*, 825 F.2d 238, 239 (9th Cir. 1987). The burden is on the railroad applying for the certificate of abandonment to show that the present or future public convenience and necessity require or permit the abandonment. 49 U.S.C. § 10904(d)(1); *Black v. I.C.C.*, 737 F.2d 643, 650 (7th Cir. 1984); *Cartersville Elevator, Inc. v. I.C.C.*, 724 F.2d 668 (8th Cir. 1984), adhered to by 735 F.2d 1059 (en banc) (1984). The regulations also require the railroad to satisfy a lengthy set of procedural prerequisites and to present specific and accurate cost/revenue data. *City of Cherokee v. I.C.C.*, 641 F.2d 1220, 1228 (8th Cir.), *cert. denied*, 454 U.S. 892 (1981). Under 49 U.S.C. § 10905(c), once the I.C.C. has decided to permit an abandonment, it must publish its findings in the Federal Register for notice and comment.

[3] The process for abandonment is set forth in 49 U.S.C. §§ 10903, 10904. However, under 49 U.S.C. § 10505, the I.C.C. has authority to grant exemptions from this process to certain carriers. *Illinois Commerce Comm'n v. United States*, 779 F.2d 1270, 1271-72 (7th Cir. 1985). In the 1970's several major railroads went bankrupt and collapsed. Congress, to encourage revived private investment in rail transportation, drastically overhauled the Interstate Commerce Act to loosen "the vise grip of regulation through several important enactments, including the Staggers Act." *CMC Real Estate Corp. v. I.C.C.*, 807 F.2d 1025, 1031 (D.C. Cir. 1986). The Staggers Act hastened the pace of rail deregulation by the exemptions provisions of 49 U.S.C. § 10505. "The express purpose of Congress in enacting section 10505 was to grant the Commission authority to review its regulations and withdraw any regulations found to be unnecessary to effectuate the goals of national transportation policy or regulations that served little or no public purpose." *Id.* The I.C.C. was charged with the

responsibility for " 'actively pursuing exemptions for transportation and service that comply with the section's standards.' " *Id.* (quoting H.R. Rep. No. 1035, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. Code Cong. & Admin. News., 3978, 4005). As an example, Congress specifically removed the exemption hearing requirement to broaden the I.C.C.'s exemption authority. *CMC Real Estate Corp.* at 1032. The criteria for exemption for abandonment is in 49 C.F.R. § 1152.50. Under that section the railroad must file a *verified* notice with the Commission at least 50 days before the abandonment or discontinuance is to start. 49 C.F.R. § 1152.50 (d)(2). The notice "shall include the proposed consummation date", state that any traffic using the lines can be rerouted, and contain information about the railroad requested in 49 C.F.R. § 1152.22(a)(1)-(4) and (8). The notice will be published in the Federal Register within 20 days from the filing of the notice of exemption and the exemption *will be effective* 30 days after publication (unless stayed pending reconsideration). 49 C.F.R. § 1152.50 (d)(3). Thus, the exemption takes the railroad out of the regulation scheme.

In *Idaho II*, the terms of the I.C.C. exemption stated that the railroads were required to notify the I.C.C. in writing within one year if "actual" abandonment was to take place. *Idaho II*, 617 F. Supp. at 214. The railroad in that case gave notice in writing that they had chosen not to proceed with actual abandonment but converted the line to side track for storage. *Id.* Thus, under the terms of exemption in that case, it is clear it was not a decree of abandonment.

Here Southern Pacific filed a notice of exemption on August 18, 1982 concerning its relocation project with Western Pacific. In the notice, the railroad petitioned the I.C.C., pursuant to 49 U.S.C. § 10505, for exemption from 49 U.S.C. §§ 10903-10907 to allow it to abandon the lines in Niles Canyon and Altamont Pass. *Vieux*, 695 F. Supp. at 1028. Although its August 18th notice is verified, there is no consummation date. Instead, the railroad's notice states that

Southern Pacific "would not exercise its abandonment exemption authority, if granted, until and unless the SPT-WP (Southern Pacific and Western Pacific) trackage rights agreement had been approved by the Commission." This was purportedly to avoid any cessation of service to any shipper. The I.C.C. September 13, 1982 "Notice of Exemption" also contains no "consummation date." The I.C.C. Notice of Exemption does state that Southern Pacific "will abandon its line. . .[c]oncurrently with acquiring trackage rights over the Western Pacific track." The agreement between Southern Pacific and Western Pacific, dated October 12, 1981, provides that "[t]his agreement. . .shall become effective as of the date Southern commences to use said joint trackage, but no later than two (2) years from the date hereof, unless otherwise agreed to in writing by the parties hereto. . . ."

[4] The district court did not decide if the exemption in this case was such a decree. *Vieux*, 695 F. Supp. at 1029. Instead, the court stated

> Even assuming, *arguendo*, that the ICC's approval of Southern Pacific's "Notice of Exemption" did amount to the requisite congressional act. . .the other prong of the *Idaho II* interpretation of the requirements for abandonment under § 912, i.e., the cessation of use and occupancy, has not been met.

Id. The exemption in this case was not the requisite decree or "Act of Congress" as called for by the statute. First, Southern Pacific received an "exemption" from the regulations — not a certificate of abandonment. This puts any decision by the railroad to abandon its lines outside the regulatory scheme of the I.C.C.; the I.C.C. regulates and approves abandonment. *Chicago & N. W. Transp. Co.*, 450 U.S. at 320; *CMC Real Estate Corp.* at 1031. The I.C.C. does not determine abandonment. Second, the "consummation date" of the abandonment was to be when Southern Pacific moved its services to the Western Pacific tracks. Part of the reason the I.C.C.

approved the trackage rights agreement and the exemption from abandonment was because there would be no cessation of service for the shippers. This "consummation date" was in 1985, when Southern Pacific tore up its tracks and moved its operations to the Western Pacific lines. Third, the I.C.C. approval of abandonment, even in formal abandonment proceedings, is only a determination that under its Congressional mandate, cessation of service would not hinder I.C.C.'s purposes. It is not a determination that the railroad has abandoned its lines. Lastly, the only remedy for an "illegal" abandonment, that is one that is not approved by the I.C.C., is an injunction brought by the I.C.C., the U.S. or a state government. *Chicago & N. W. Transp. Co.* at 322, n.9; *I.C.C. v. Chicago & N.W. Transp. Co.*, 533 F.2d 1025, 1028-29 (8th Cir. 1976). Thus, a railroad could abandon without any involvement from the I.C.C., if there is no injunctive action brought and if a court decrees that the railroad has abandoned the line. The I.C.C. regulations and process determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred.

b. Act of Congress

There is some evidence that the requisite Act of Congress is just that, a bill passed by Congress declaring a railroad right of way to be abandoned. The appellants contend that only the I.C.C. has the power to declare abandonments and that Congress delegated this exclusive power. However, the County, through Congressman Pete Stark, sponsored Pub. L. No. 100-693, 102 Stat. 4559 (1988), which as its purpose declares the rights of way in question in this litigation to be abandoned. "[Pub. L. No. 100-693] is intended to provide a Congressional pronouncement of abandonment of the type described in the 1922 Act." H.R. Rep. No. 941, 100th Cong., 2d Sess. (1988).

Although Pub. L. No. 100-693 gives us some clue as to the intent of Congress in interpreting § 912's language "Act of Congress," it does not and cannot affect this litigation. Pub. L. No. 100-693:

> Nothing in this Act shall be construed as expanding or diminishing any right, title, or interest of any party other than the United States in the real property described in section 3 which under applicable law vested in any such party on or before the date of enactment of this Act.

Pub. L. No. 100-693, 102 Stat. at 4559-60. Since this litigation involves only rights that vested, if at all, prior to enactment of Pub. L. No. 100-693, the new law cannot affect this litigation.

Further, there was testimony before the committee and discussion on the floor of the House which indicated an intent not to disturb this litigation.

> [T]he committee amendments are intended to assure that the bill cannot be construed as an attempt to resolve any of the issues in ongoing litigation concerning these lands. . . .HR 4039 as reported includes explicit language that nothing in the bill is to be construed as expanding or diminishing any right these parties may have in the lands in question if that right vested on or before the date of enactment. I believe that this fully protects the position of all parties in the litigation.

_ Cong. Rec. No. 7851 (September 20, 1988), (Statement of Congressman Vento (Minn.)). As the law itself purports not to intrude on this litigation, we cannot construe it to do so. Therefore, although this law indicates that the requisite "Act of Congress" is indeed an Act of Congress and not a declara-

tion from the I.C.C., it is not an Act of Congress that affects the rights of these parties before us at this time.

2. Use and Occupancy.

[5] Even though we have determined that the second prong of *Idaho II* has not been satisifed as there was no decree by a court or Congressional act, thereby precluding the finding of vested reversionary rights under § 912, appellants could have non-vested reversionary rights under the first prong of *Idaho II* triggered by abandonment of use and occupancy of the right of way by the railroad.

This inquiry is a factual one, looking for actual abandonment. The district court here interpreted "use and occupancy" of "railroad purposes" by first looking to the "plain and apparent meaning of the terms" of the statute and then turning to the common law principles of abandonment for guidance. *Vieux*, 695 F. Supp. at 1027-29; *see also Idaho II*, 617 F. Supp. at 217. Other circuits have characterized "abandonment" to be "an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line." *Chicago & N. W. Transp. Co.*, 450 U.S. at 314, n.2; *I.C.C. v. Chicago & N.W. Transp. Co.*, 533 F.2d at 1028 (citing *I.C.C. v. Maine Central R. R.*, 505 F.2d 590, 593 (2d Cir. 1974)).

The district court here found that the "use and occupancy" of the right of way did not cease until April, 1985 at the earliest and perhaps even as late as August, 1985. *Vieux*, at 1032. The factual findings of the trial court will not be disturbed unless clearly erroneous. The district court, based on exhibits and declarations submitted at the court's request, found:

1. That Southern Pacific paid taxes on the rights of way through March 31, 1985 as "operating property" and through March 31, 1986 paid property taxes on its interest in the

transferred rights of way as "nonoperating property." *Vieux* at 1030-31.

2. That Southern Pacific continued to use the rights of way through Niles Canyon and Altamont as a secondary route into the Bay Area from the Central Valley and for local customers through March, 1983. *Id.* at 1031.

3. After the winter storms in 1983, during which track in the Niles Canyon was damaged, necessary repairs were made to return the track to regular service and the track continued to be inspected by Southern Pacific throughout its entire length. *Id.* at 1032.

4. Southern Pacific did not rip out the tracks remaining after the 1983 winter storm on the Altamont Pass right of way until May, 1986. *Id.*

5. After March, 1983, Southern Pacific used the section of track east of the damaged portion for the storage of box cars. *Id.* at 1031.

6. Between March and August, 1985, Southern Pacific held training exercises involving the operation of engines and cars over the tracks in the Altamont Pass area east of Ulmar and west of Tracy. *Id.*

7. Plaintiff, R. Vieux (while in conflict with his declaration of March 17, 1987) testified in deposition that trains last passed across the right of way on his property between January and June, 1985 and that Southern Pacific's tracks and ties across his land were not removed until August, 1986. *Id.* at 1032.

8. Plaintiff J. Jess (also in conflict with his declaration of March 17, 1987) testified in his deposition that Southern Pacific placed cattle guards at the two points where fencing crossed the tracks to allow the trains through without letting

the cattle out in the summer of 1984 or 1985. He testified further that trains crossed his property last either in the summer of 1984 or 1985 and that Southern Pacific's tracks and ties remained until the summer of 1986. *Id.*

[6] Thus it appears, and the district court found, that Southern Pacific's use and occupancy did not cease on its two respective rights of way until April, 1985 at the earliest and perhaps as late as August, 1985, when the railroad ceased to use the tracks for training exercises. *Id.* at 1032. *See also Matter of Chicago Milwaukee, St. Paul, and Pac. R.R. Co.*, 654 F.2d 1218, 1221 (7th Cir. 1981)("If trains continued to run on the line — albeit infrequently — ... then the railroad remained in possession.")

[7] The court also looked to common-law principles of abandonment, that is, whether there is (1) present intent to abandon, and (2) physical acts evidencing clear intent to relinquish the property interest. *Vieux* at 1030 and n. 5; *Idaho II*, 617 F. Supp. at 217. The railroad showed through its notice of exemption and through its agreement with Western Pacific that it did not intend to abandon the track until the transfer to Western Pacific lines was complete, including the I.C.C. approval of the transfer. The "physical acts" of the railroad also show an intent not to abandon until at the earliest April of 1985. Not only the "use and occupancy" facts cited above illustrate this intent, but also the fact that the railroad quitclaimed the rights of way to the County, made an agreement with the County and took the fiber optics and pipeline easements back from the County all show an intent not to abandon. Conveyance of property and abandonment of property are not consistent actions. If the railroad had wanted to abandon the property, it would have simply followed the procedures outlined by the I.C.C. and allowed the reversion to take place, and would not have conveyed the land before their "use and occupancy" ceased. The district court's findings of fact are not clearly erroneous and are supported by the record

as is its holding that abandonment occurred no earlier than April, 1985.

[8] Having established that abandonment of the use and occupancy of the right of way has occurred, we must determine whether the county has legally established a public highway which would extinguish the appellants' non-vested reversionary rights.

3. Exceptions Clause - Legally Established Highway.

[9] The appellants' non-vested reversionary rights are extinguished if the rights of way are "embraced in a public highway legally established within one year after the date of said. . .abandonment." 43 U.S.C. § 912. State law determines what is a "public highway legally established" for the purposes of federal land grant statues, including § 912. *Standage Ventures, Inc. v. Arizona,* 499 F.2d 248, 250 (9th Cir. 1974). Under California common law, where a county is granted and accepts a right of way to be used exclusively for a county road, the acceptance of the grant operates to establish the right of way as a county highway. Cal. Sts. & High. Code § 941 (West Supp. 1989); *Watson v. Greely,* 69 Cal. App. 643, 649, 232 P. 475, 478 (1924). The action of the grant and acceptance of the right of way constitutes a dedication of the strip to county road purposes. *Watson,* 69 Cal. App. at 649. No improvement is necessary to make the right of way a highway. *Venice v. Short Line Beach Land Co.,* 180 Cal. 447, 181 P. 658, 659 (1919). Southern Pacific "granted" these rights of way to the County in its agreement of April 23, 1985 when it agreed to quitclaim the rights of way if the County placed them "into the County's highway system to be used for highway and/or transportation related facilities purposes thereafter." Plaintiffs' Trial Ex. 56 at 1, ¶ 1. The County accepted these grants and embraced them as part of the county system of highways when on April 23, 1985, it passed the County Board Resolution. Defendants' Trial Exs. H and I; *Vieux* at 1026.

Appellants contend that this is not enough and that appellees must also comply with the California Environmental Quality Act of 1970 (CEQA). Cal. Pub. Res. Code § 21000-21165. Appellants alleged that appellees did not comply with CEQA because they did not prepare an environmental impact report (EIR). CEQA has a three tier structure to determine the necessity of an EIR. *Perley v. County of Calaveras*, 137 Cal. App. 3d 424, 430, 187 Cal. Rptr. 53, 56 (1982). If a project is exempt or if it is certain that the activity will have no significant effect on the environment then no further evaluation is required. Cal. Pub. Res. Code §§ 21084, 21085; 14 Cal. Admin. Code § 15060 (West 1986). If there is a possibility that the project may have a significant effect but after an initial threshold study by the State Resources Agency it is determined there will not be a significant effect, the agency may declare this in a brief Negative Declaration. 14 Cal. Admin. Code § 15083. Last, if the project will significantly affect the environment, an EIR is required. Cal. Pub. Res. Code §§ 21100, 21151; *Perley*, 137 Cal. App. 3d at 430, 187 Cal. Rptr. at 56. The County Board of Supervisors on April 12, 1985, adopted a Negative Declaration as no significant impact upon the environment was contemplated with the granting and acceptance of the rights of way because they had no physical effect on the land.

> [W]hen the county is prepared to adopt more specific plans for construction projects on the donated land, it will have to comply with CEQA's requirements before proceeding with those projects.

Vieux at 1027 (quoting the County's Memorandum in Opposition to Plaintiff's Petition for Writ of Mandate). The district court found that "CEQA only stands as a bar to the County's *future use*, if any, of the legally established highway." *Vieux* at 1027 (emphasis in original). We agree with the district court and affirm its finding that the County legally established a public highway and complied with CEQA and we further hold that this occurred within one year of abandonment. This

vests the ownership of the rights of way with the County and extinguishes all of appellants' reversionary rights.

B. Limited Evidence.

Appellants objected to the court's decision to accept only exhibits and declarations on the issue of abandonment, especially those of the County and Southern Pacific, as hearsay. Appellants contended they should have had a right to cross examine the adverse witnesses. The district court overruled their objections as appellants were told during the trial on March 4, 1987, to file counterexhibits and declarations if they thought them to be appropriate. Appellants failed to do so. *Vieux* at 1030 n. 7. The district court also noted in its opinion that some of appellants' declarations submitted before trial contradicted appellants' own deposition testimony. *Id.* The district court's evidentiary rulings can be reversed only if it abused its discretion. *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1412 (9th Cir. 1986). A reviewing court cannot reverse for an abuse of discretion unless it has a definite and firm conviction that the court below committed an error. *Id.* Here, the district court gave the parties ample opportunity to submit their evidence. As some of the plaintiffs evidence was self-contradictory, it would be difficult to say the court abused its discretion in allowing only exhibits and documentary evidence. *See Idaho II* at 214. This limitation is also reasonable in light of the fact that most of the relevant information would be proven through documents — for example, if Southern Pacific was paying taxes on the land; if their training exercises were directed there. Additionally, the "testimony" of plaintiffs as to when they saw trains crossing their line was contradictory and not as reliable as the written documents submitted. Therefore, the court did not abuse its discretion when it limited the evidence on the issue of abandonment.

C. Other Actions Against the County and Southern Pacific

Appellants' rights to the property stem only from the reversionary rights established in 43 U.S.C. § 912. We have found

that these reversionary rights were extinguished in April, 1985, when Southern Pacific conveyed the rights of way to the County and when the County legally established a public highway. This disposes of all other issues in this case against these defendants. Appellants have no further interest in the land and the County's actions were legal. We affirm the district court's summary judgment in favor of the County and Southern Pacific on the other causes of action including the federal civil rights action, the quiet title actions and the actions under California law.

D. Actions Against the Park District.

1. The § 1983 claims against the Park District.

The appellants contend that the Park District conspired with Southern Pacific and Alameda County to unlawfully take the property rights of appellants and introduced legislation before Congress for the purpose of accomplishing this objective with the knowledge that the legislation would be unlawful. The appellants specifically allege that:

> The County, PARK DISTRICT and SP (Southern Pacific) implemented a fraudulent scheme so that their goals (a County land grab, a PARK DISTRICT trail and an SP illegal fiber optics line) could be implemented by defrauding the plaintiffs of their reversionary rights through bad faith semantic manipulation of federal law (43 USC 912).

In order to prove a civil conspiracy, the parties to have conspired must have reached "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985) (citations omitted), *cert. denied*, 474 U.S. 1059 (1986). A civil conspiracy is a combination "of two or more persons who, by some concerted action, intend to accomplish some unlawful objec-

tive for the purpose of harming another which results in damage." *Doleman v. Meiji Mut. Life Ins. Co.*, 727 F.2d 1480, 1482 n. 3 (9th Cir. 1984) (citations omitted).

Here, the district court found that appellants had not met their burden by failing to produce any evidence supporting the theory of conspiracy. We agree and affirm the district court. The Federal Rules of Civil Procedure, Rule 56(c) "mandates the entry of summary judgment. . .against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Although appellants showed correspondence or discussions between the Park District and other defendants, they have not shown an "illegal objective." The appellants allege that the Park District's objective in the conspiracy was an illegal taking of property. However, because the County legally acquired the property, there was no intent to cause an illegal taking. The Park District's introduction of legislation which might have given them an interest in the rights of way also was not illegal. The Park District had a right to assert a legitimate inquiry into the possibilities of acquiring the rights of way and without more evidence of an "illegal" objective, the lobbying is not evidence of the alleged conspiracy. Further, appellants' argument is based on the fact that the County's and Southern Pacific's actions were illegal, and thus the Park District's participation in discussions concerning the rights of way was illegal as well. Appellants based their contention on the I.C.C.'s approval of the railroad's exemption application. They claim the date of the Notice of Exemption is the date of abandonment, that the defendants knew this and they proceeded to deny the appellants their reversionary rights anyway. We have already held that abandonment did not occur when the exemption notice was issued. Therefore, the appellants had no reversionary interest at that time and the appellees here, especially the Park District, in no way "denied" the

landowners their reversionary rights in any way other than that provided for in 43 U.S.C. § 912.

2. The federal and state quiet title claims.

The Park District does not now hold, nor has ever in the past held any valid legal interest in the disputed property. The appellants contend that "the Park District is perched to accept the rights of way: an acceptance that would clearly violate 43 U.S.C. § 912." The district court found that because the Park District had no current interest in the disputed property that the claims were "purely hypothetical, and would require this court to issue an advisory opinion." The district court found it lacked jurisdiction to hear the action because it was not an actual case or controversy. We agree.

Federal Courts are limited to deciding the outcome of an actual "case or controversy." U.S. Const. Art. III; *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937).

> It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Aetna Life Ins. Co., 300 U.S. at 241. The ripeness doctrine prevents courts from deciding abstract issues that have not yet had a concrete impact on the parties. *Assiniboine and Sioux Tribes v. Bd. of Oil and Gas Conservation*, 792 F.2d 782, 787 (9th Cir. 1986). The ripeness inquiry looks to (1) whether the issue is fit for judicial decision and (2) hardship to the parties if the review is withheld. *Id.* at 788. Appellants want either the disputed land in question, damages for the taking of the land and/or a declaration that they have rights to the land. The Park District here does not have any title to the land so cannot hand over the land to appellants, nor can they be liable for damages for a "taking." A declaration as to

the rights to the land would be equally futile. 28 U.S.C. § 2201 (1982) (Declaratory Judgment Act applies only to "a case of actual controversy").

III.

CONCLUSION

Appellants lost their reversionary rights under 43 U.S.C. § 912 when the railroad actually abandoned their rights of way, conveyed them to the County for a public highway, and the County established a legal public highway under the exceptions clause of § 912. Thus, no additional causes of action lie against the County or Southern Pacific as appellants have no property interest to assert. Appellant's Writ of Mandate was properly denied as the County's actions were not illegal. Appellants have no legal controversy with the Park District. As appellants have not prevailed, no attorneys fees will be awarded.

[10] The plaintiffs also claim reversionary rights to the disputed land under private land grants. In their complaint, plaintiffs allege rights to the land based on the federal statute and private grants. (Plaintiff's Complaint, p. 18, § 42 & ex. A). The issue of plaintiffs' potential reversionary rights under private land grants was not separately considered by the district court. The district court held that plaintiffs had no reversionary rights under the federal statute and then dismissed the plaintiff's remaining claims on the basis that they could not state any other claims because the federal statute extinguished any reversionary rights in the land they might have had. However, the district court's disposition fails to consider that some of the plaintiffs may have reversionary rights in the land by virtue of the private land grants. Because the district court did not rule on the issue, this opinion does not affect the claims of those landowners who may have reversionary rights under private land grants. We affirm the district court's opinion regarding the Act of Congress grants but reverse and

remand for further proceedings regarding the private land grants in this case.

This panel retains jurisdiction for all further appeals in this matter.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

No. 90-509

In The

Supreme Court of the United States

October Term, 1990

BOB VIEUX, et al.,

Petitioners,

vs.

COUNTY OF ALAMEDA, SOUTHERN PACIFIC TRANSPORTATION COMPANY, SANTA FE PACIFIC REALTY CORPORATION, ROBERT T. KNOX, JOHN GEORGE,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. The court of appeals held that an ICC order excusing a railroad from following abandonment procedures designed to satisfy requirements of public convenience and necessity under the Transportation Act (49 U.S.C. § 10903) is not a decree of abandonment "by a court of competent jurisdiction" or by "Act of Congress" under the Public Lands Act. (43 U.S.C. § 912). Should the Court review that holding given that:

   a. There is no conflict with a decision of any other court of appeals or state court of last resort;

   b. This is the only time the issue has arisen in the 68 years since the Public Lands Act was passed, and it is unlikely to arise again; and

   c. The holding is clearly correct based on both the statute's plain language and Congress' intent?

2. The court of appeals held that the County legally established the rights-of-way in question as a public highway by formally designating the land as part of its highway system and by complying with the California Environmental Quality Act. Should the Court review that holding given that:

   a. The issue is purely one of state law, which the court of appeals expressly applied; and

   b. The decision is unlikely to affect anyone other than the parties to this case?

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JURISDICTION

The Petition omits jurisdictional information required by this Court's rules 14.1(e)(iv) and 14.1(i). The basis for federal jurisdiction in the first instance was 28 U.S.C. § 1331. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254 (1).

OPINIONS BELOW

The opinion of the court of appeals is reported at 906 F.2d 1329 and is reproduced as Appendix A to the Petition. The district court's opinion is reported at 695 F. Supp. 1023. It is not annexed to the Petition as required by S. Ct. R. 14.1(k)(ii). For the Court's convenience, it is reproduced as Appendix B to this brief.

STATUTORY PROVISION

The statutory provision involved, 43 U.S.C. § 912, is inaccurately and incompletely quoted in the Petition. It reads as follows:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures

> of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: *Provided*, That this section shall not affect conveyances made by any railroad company of portions of its right of way if such conveyance be among those which have been or may after March 8, 1922, and before such forfeiture or abandonment be validated and confirmed by any Act of Congress; nor shall this section affect any public highway on said right of way on March 8, 1922: *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

STATEMENT OF THE CASE

This is a dispute over whether certain land, formerly Southern Pacific's[1] railroad rights-of-way, should be incorporated into the County's transportation system for use by the general public, or instead should be given as a windfall to private individuals for their personal use.

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[1] Respondents Southern Pacific Transportation Company and Santa Fe Pacific Realty Corporation are referred to collectively as "Southern Pacific." The remaining respondents, County of Alameda, Robert Knox and John George (two County Supervisors) are referred to collectively as "the County."

Petitioners claim that the rights-of-way bordering their property reverted to them when Southern Pacific ceased using them.

The rights-of-way in question were part of the path of the first transcontinental railroad. They were acquired by Southern Pacific's predecessors in the 1860's via federal land grants made pursuant to the Acts of July 1, 1862, ch. 120, 12 Stat. 489 and July 3, 1864, ch. 216, 13 Stat. 356. These Acts awarded rights-of-way through public lands to railroad companies for a combination of railroad and telegraph uses in order to induce the construction of the country's early railroads. § 2, 12 Stat. 489, 491; § 3, 13 Stat. 356, 357.

From the time the railroad was completed in the late nineteenth century through August 1985 the rights-of-way were used by Southern Pacific and its predecessors. In October 1981 Southern Pacific began a gradual process of consolidating its tracks with Western Pacific Railroad's parallel tracks in the area of the rights-of-way. In light of this proposed project, Southern Pacific filed a notice of exemption from abandonment proceedings with the ICC, asking to be excused from normal ICC abandonment procedures due to the insubstantial nature of the transaction and the minimal impact the proposed changes would have on railroad employees, customers and the area's transportation system in general.[2] On September 13, 1982,

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[2] As noted by the district court in its Opinion and Order:

> Section 10505 of Title 49 exempts a person from provisions of the interstate subtitle, i.e.,

(Continued on following page)

the ICC published a Notice of Exemption which, by not denying Southern Pacific's request (and by not being stayed within the 30 day notice period), had the effect of granting it. *See* 49 C.F.R. § 1152.50(d)(3) (1989). Southern Pacific actually continued to use the rights-of-way through the spring and summer of 1985 until the consolidation with Western Pacific was completed. Among other things, Southern Pacific continued to classify the rights-of-way as operating property and to pay taxes, store railroad cars and conduct training operations upon them. The ICC has taken no other relevant action with respect to the rights-of-way since its September 1982 Notice of Exemption.

In 1985 the County and Southern Pacific negotiated an agreement, subject to the consent of the County's Board of Supervisors, by which Southern Pacific would donate the land to the County, retaining only pipeline and fiberoptic cable easements. The agreement specifically required the County to place the donated rights-of-way into the County's highway system and to use them for highway or other transportation purposes in accordance with 43 U.S.C. § 912.

(Continued from previous page)

§§ 10903-10907, when the provisions are (1) not necessary to carry out transportation policy, and (2) either (a) the transaction or service is of limited scope or (b) the application of provisions are not needed to protect shippers from the abuse of market power. *Vieux v. County of Alameda*, 695 F. Supp. 1023, 1029 n.2 (N.D. Cal. 1987) (App. B-15 n.2)

On April 12, 1985, the County published a notice of its intention to adopt a Negative Declaration as required by the California Environmental Quality Act ("CEQA"), Cal. Pub. Res. Code § 21092 (Deering 1987). The Negative Declaration found that the acquisition of the donated land would cause no substantial, or potentially substantial, adverse change in the environment because no construction was contemplated at that time. On April 23, 1985, the County Board of Supervisors approved the agreement and adopted a resolution accepting Southern Pacific deeds to two sections of right-of-way and incorporating the rights-of-way into the County's highway system as county roads. The County is preserving this valuable transportation corridor – in full accordance with state law – until further study and the passage of time allows for an accurate assessment of the County's transportation needs into the twenty-first century.

In 1988 Congress enacted the Act of November 18, 1988, Pub. L. No. 100-693, 102 Stat. 4559 (1988), which formally declared the rights-of-way in question to be abandoned. Within a year of that Act, the County adopted resolutions redeclaring the rights-of-way to be county roads within its highway system.[3]

Meanwhile, on May 21, 1985, Petitioners had filed a Complaint against the County of Alameda, two members of the County's Board of Supervisors, Southern Pacific Transportation Company, Santa Fe Pacific Realty Corporation and the East Bay Regional Park District. The

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[3] The Act provided that it was not to affect the rights of the parties in this action.

essence of their claims, and the only claims before this Court, was that Petitioners are entitled to the land embodied in the rights-of-way under the reversion clause in 43 U.S.C. § 912.

The district court, on a full factual record, found no merit in these claims. It held that the rights-of-way had not reverted to Petitioners, but rather had been conveyed by Southern Pacific to the County for continued public use as a transportation corridor. *Vieux v. County of Alameda*, 695 F. Supp. 1023 (N.D. Cal. 1987) (App. B). The court of appeals affirmed, holding that Petitioners could not satisfy the requirements for reversion under section 912. *Vieux v. East Bay Regional Park Dist.*, 906 F.2d 1329 (9th Cir. 1990) (Pet. App. A).

The decisions below implement the national policy that former land-grant railroad rights-of-way, having once been placed in the public realm to benefit the public through the construction of transportation corridors, should continue to be used for public purposes whenever possible.[4]

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[4] Federal statutes and case law reflect this national policy. The congressional report in support of section 912 of the Public Lands Act expressly declares the desirability of allowing the rights-of-way to be used for highways. H.R. 217, 67th Cong., 1st Sess. 2 (1921). *See also* 49 U.S.C. § 10906 (requiring that when the ICC approves the abandonment of a right-of-way, it determine whether the railroad properties involved are suitable for use for public purposes); *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207, 212-13 (D. Idaho 1985) ("With the relatively recent advent of the automobile, the 66th and 67th Congresses obviously perceived the rising importance of highway transportation; and acted to preserve, where possible, railroad rights-of-way for such use.").

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners do not even purport to offer a reason why this Court should review this case under the guidelines of Supreme Court Rule 10. Thus, Petitioners do not contend that there is (1) any conflict with a decision of another court of appeals or state court of last resort, (2) any basis for the exercise of this Court's supervisory power or (3) any important question of federal law. To the contrary, Petitioners concede – correctly – that this is the only time the Public Lands Act issues they ask the Court to review have reached a court of appeals. Since that Act was passed in 1922, it is clear that the issues do not reflect any widespread or recurring problem that warrants the Court's time and attention.

Moreover, Petitioners' arguments are seriously misleading, attacking positions that bear no resemblance to the court of appeals' actual decision. Indeed, petitioners' arguments are largely irrelevant to the case.

Finally, Petitioners' arguments are simply and clearly wrong. They would have this Court make them a gift of public land – land that they never owned, never paid for and do not deserve – on the basis of theories that cannot be reconciled with the statute or with common sense. Both courts below rejected Petitioners' theories and denied Petitioners this private windfall. Instead, those courts applied the plain statutory language and carried out Congress' express intent by holding that the land had been validly incorporated into the County's highway system, thereby preserving a valuable transportation corridor for the benefit of the general public. Those holdings

are both sound and unexceptional. There is no basis for this Court to review them.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN DECISIONS OR ANY IMPORTANT FEDERAL QUESTION TO REVIEW.

Petitioners concede that this is the first time the Public Lands Act issues involved here have reached a court of appeals (Pet. 1, 5, 13), and therefore they present no conflict in decisions. Nor is it difficult to understand why the issues have not been litigated on appeal before: They are not substantial.

A. The Reversion Claim

Petitioners claim the rights-of-way solely on the basis of the reversion clause of section 912. To satisfy that clause they first had to show that there was a decree of abandonment by a "court of competent jurisdiction" or by "Act of Congress." There was neither, and Petitioners do not contend otherwise.[5] That should end the matter.

Petitioners' contention that Congress delegated responsibility for decreeing abandonment to the ICC (Pet. 5, 8) is unsupported by anything in the statute or in the case law. The statutory words "decree of abandonment"

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[5] Pub. L. No. 100-693 is such an Act of Congress, but it was enacted in 1988, after the trial in this case, and Petitioners do not contend that it supports their claim under section 912. Indeed, the Petition does not even mention it.

by a "court of competent jurisdiction" or by "Act of Congress" simply cannot be read to include an ICC "Notice of Exemption" from Transportation Act procedures. In fact, section 912 was enacted two years *after* the Transportation Act. If Congress thought the Transportation Act delegated authority to the ICC to decree abandonment – as petitioners contend – it would not have specified a judicial decree or an Act of Congress when it enacted section 912.

Petitioners' delegation theory confuses Transportation Act issues with Public Lands Act issues. The ICC's exclusive role in the abandonment process is to balance the interests of shippers and employees against the interests of the carrier and the transportation system at large, *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981), and to authorize abandonment where present or future public convenience and necessity require or permit. 49 U.S.C. § 10903(a). As the court of appeals recognized, this determination is all that Congress has delegated to the ICC, and it has nothing to do with a decree that abandonment has occurred for purposes of the Public Lands Act. 906 F.2d at 1337 (Pet. App. A-22).

Moreover, as the court of appeals also noted, Congress has indicated that "Act of Congress" means just that by recently passing a bill declaring the abandonment of the very rights-of-way in issue in this case. 906 F.2d at 1339 (Pet. App. A-22-24) (citing Pub. L. No. 100-693, 102

Stat. 4559 (1988)). That Congressional declaration is squarely inconsistent with Petitioners' delegation theory.[6]

Finally, even if Congress had delegated authority to declare abandonments, there is no basis for concluding that the ICC even thought it was making such a declaration when it issued the Notice of Exemption involved here. That Notice on its face deals only with Transportation Act matters, not Public Lands Act issues. It did not declare that any abandonment had occurred or even fix a date on which it would occur. And, there was no actual abandonment until some three years later. 906 F.2d at 1340-41 (Pet. App. A-24-27); 695 F. Supp. at 1029-32 (App. B-18-25). In short, it would be contrary to fact and would make no sense to interpret the ICC's Notice of Exemption as a declaration that the rights-of-way had been abandoned.

Petitioners have no answer to these points, and so ignore them. Instead, Petitioners try to attack the court of appeals' decision by misstating it. (Pet. 6-9) Specifically, Petitioners claim that the court erred by resting its decision "upon an arbitrary finding that an ICC approval of abandonment in the long form is a 'decree' under the Public Lands Act, but an abandonment in the short form, is not a decree." (Pet. 9; *see also* pp. 6-8) This claim is both false and irrelevant.

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[6] Although the bill states that it is not intended to dispose of this litigation, its very existence demonstrates that Congress has *not* delegated its authority to declare abandonment to the ICC.

First, Petitioners' description of the court of appeals' decision is quite flagrantly false. The court said:

> [T]he I.C.C. approval of abandonment, even in formal abandonment proceedings, is only a determination that under its Congressional mandate, cessation of service would not hinder I.C.C.'s purposes. It is not a determination that the railroad has abandoned its lines. . . . The I.C.C. regulations and process determine what effects an abandonment will have and what the railroad must do to counteract those effects before it abandons, but they do not determine that an abandonment has actually occurred.

906 F.2d at 1339 (Pet. App. A-22).

Second, the distinction that Petitioners erroneously attribute to the court of appeals is irrelevant. This case involves only a Notice of Exemption that clearly is not a declaration of abandonment. (p. 11 above) There simply is no issue as to the effect of any other type of ICC proceeding.

The court of appeals decision is plainly correct and dispositive of petitioners' claims. It presents no issue of substance for this Court.

B. The Attack On The Quitclaim Deeds

Petitioners' second attack on the court of appeals decision is no better than their first. Again, there is no conflict in decisions and no important federal question warranting this Court's attention. And again, Petitioners' argument is based on a misreading of the court of appeals decision that would be irrelevant even if it were accurate.

Petitioners say the decision below "establishes a binding federal circuit precedent that a railroad may transfer an Act of Congress grant unilaterally by a quit-claim deed, thus effectively rendering the Public Lands Act a nullity." (Pet. 10) The court of appeals did no such thing. In fact, the court of appeals held only that Petitioners had not satisfied the conditions for showing that the rights-of-way had reverted to them. The court's only references to the deeds were in connection with its discussion of the evidence supporting the district court's finding that there was no intent to abandon, 906 F.2d at 1341 (Pet. App. A-26), and in explaining the California common law for establishing a public highway. *Id.* (Pet. App. A-27). Neither of those references poses *any* federal issue, let alone the one Petitioners suggest.[7]

Moreover, Petitioners' description of the decision would be irrelevant if it were accurate. Petitioners' claims depend entirely on satisfying the conditions for reversion under section 912. The validity of the deeds has nothing to do with those conditions; even if the deeds were invalid, Petitioners would still lose.

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[7] Petitioners are also dead wrong on the merits. Nothing prohibits a railroad from executing deeds of its rights-of-way. Petitioners' reliance on section 913 of the Public Lands Act, 43 U.S.C. § 913, (Pet. 10) is misplaced. Section 913 applies only where a railroad seeks to convey a limited portion of the width of its rights-of-way – *e.g.*, 50 feet of a 400 foot right-of-way. It does not apply where, as here, the entire width is conveyed. Moreover, even the limited restriction of section 913 may have been repealed. 23 U.S.C. § 316. *See also Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 219, 220 (D. Idaho 1985).

II. THIS COURT DOES NOT SIT TO REVIEW STATE LAW QUESTIONS.

Petitioners' final attack on the decision below is plainly not a fit subject for this Court's review. It is simply an attack on the court of appeals' application of California law, which Petitioners concede controls the question of establishing a public highway. (Pet. 11-12) This Court has repeatedly pointed out that it does not sit to decide questions of state law. *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of a court of appeals on a matter of state law, and we find no reason for departing from that tradition in this case."). The Court's reluctance to review state law questions is particularly great where, as here, both the district court and the court of appeals apply the same law. *Bishop v. Wood*, 426 U.S. 341, 346 (1976). There is no reason to depart from the Court's usual rule in this case.

Moreover, Petitioners' argument is again wrong on the merits. Petitioners accuse the court of appeals of "ignor[ing] the constraints of the contemporary California Environmental Quality Act of 1970" which they contend must be satisfied to establish a public highway under California law. (Pet. 11) The short answer is that Petitioners' accusation is false. The court of appeals, like the district court, fully analyzed the CEQA issues, and found that the County had complied with all applicable requirements. 906 F.2d at 1342 (Pet. App. A-28); 695 F.

Supp. at 1026-27 (App. B-9-12). Petitioners' attempt to have this court review that analysis is meritless.[8]

CONCLUSION

This case presents no conflict in decisions or any important federal question for this Court. The Petition should be denied.

Respectfully submitted,

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McCUTCHEN, DOYLE, BROWN & ENERSEN

Of Counsel

October 19, 1990

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[8] Petitioners' suggestion that the definition of "public highway" under California law makes a "mockery" of the Public Lands Act (Pet. 12) is incorrect and inconsistent with their concession that state law controls the issue. (Pet. 11-12) It is also a pure afterthought, never raised in the courts below, and therefore is not a matter this Court should review. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

APPENDICES

APPENDIX A

Rule 29.1 Information

Santa Fe Pacific Realty Corporation, now known as Catellus Development Corporation, is 80 percent owned by Santa Fe Pacific Corporation, a publicly traded corporation, and 20 percent owned by Bay Area Real Estate Investment Associates, LP, an investment vehicle funded by the California State Employees Retirement System. Santa Fe Pacific Realty Corporation's subsidiaries are all wholly owned.

Southern Pacific Transportation Company is a wholly owned subsidiary of SPTC Holdings, Inc., which in turn is a wholly owned subsidiary of Rio Grande Industries, Inc., a privately held corporation 75 percent owned by Anschutz Corporation, 20 percent by Morgan Stanley Leveraged Equity Fund II, L.P. and 5 percent by institutional investors. Southern Pacific Transportation Company's subsidiaries are wholly owned except for the following:

The Alton & Southern Ry. Co.

Arkansas & Memphis Railway Bridge and Terminal Company

Kansas City Terminal Railway Co.

Southern Ill, and Mo. Bridge Co.

St. Louis Southwestern Ry. Co.

Terminal R.R. Assoc. of St. Louis

Trailer Train Company

Central California Traction Company

The Ogden Union Ry. & Depot Co.

Portland Terminal Railroad Co.

Portland Traction Company

Sunset Railway Company

Trailer Train Company

APPENDIX B

District Court Opinion

Robert A. VIEUX, et al., Plaintiffs,

v.

COUNTY OF ALAMEDA, et al., Defendants.

No. C-85-3394 WHO.

United States District Court,
N.D. California.

Sept. 29, 1987.

Joseph M. Gughemetti, A Professional Corp., San Mateo, Cal., for plaintiffs.

Richard J. Moore, County Counsel, County of Alameda, Oakland, Cal., Lynn H. Pasahow, Rochelle Souza, McCutchen, Doyle, Brown & Enersen, San Francisco, Cal., for County of Alameda, Southern Pacific Transp. Co., Santa Fe Pacific Realty Corp., Robert T. Knox and John George.

OPINION AND ORDER

ORRICK, District Judge.

The major question considered in this action is whether plaintiff landowners become entitled to reversionary land interests in abandoned railroad rights-of-way. For the reasons set forth below, the Court finds that they do not.

I

Plaintiffs are twenty-one landowners, or executors or trustees of landowners, challenging the transfer by Southern Pacific Transportation Company ("Southern Pacific") to the County of Alameda (the "County") of certain railroad rights-of-way located in two separate areas known as Niles Canyon Road (9.7 miles long) and the Altamont Pass (11 miles long), both within the County. They represent the overwhelming majority of all owners of land adjoining or underlying the rights-of-way in those two areas.

Defendants include the County, Southern Pacific, Santa Fe Pacific Realty Corporation ("Santa Fe"), and County Supervisors Robert T. Knox and John George ("Supervisors").

Plaintiffs' first amended complaint alleges violations of the federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1985 (1981), the Public Lands Act, 43 U.S.C. § 912 (1986), and the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1962). The complaint seeks damages under the federal Civil Rights Act as well as declaratory relief under all of the aforementioned acts. Moreover, plaintiffs request a writ of mandate pursuant to §§ 1094.5 (1987) and 1085 (1980) of the California Code of Civil Procedure; a declaration of quiet title under the federal Public Lands Act and California law; damages against the Supervisors for waste of, and injury to, taxpayers' assets, property, and

funds under § 526a of the California Code of Civil Procedure (1979); declaratory and injunctive relief; and attorneys' fees pursuant to the federal Civil Rights Act, 42 U.S.C. § 1988 (1981), and § 1021.5 of the California Code of Civil Procedure (1980).

Prior to trial, the Court dismissed plaintiffs' § 1985 claim as to all defendants except the County, and dismissed with prejudice plaintiffs' petition for a writ of mandate. Before trial, plaintiffs conceded that their claim under the Cable Communications Act of 1934 was no longer applicable.

Therefore, the following claims for relief remained prior to trial: (1) the federal Civil Rights Act; (2) the Public Lands Act; (3) the quiet title action; (4) the taxpayers' suit; and (5) declaratory and injunctive relief.

The gravamen of plaintiffs' complaint is the allegation that plaintiffs became entitled to reversionary land interests in the rights-of-way when, on September 13, 1982, the Interstate Commerce Commission ("ICC") approved Southern Pacific's "Notice of Exemption" for a relocation project under which Southern Pacific would abandon its line, and within one year thereafter the rights-of-way were not embraced in a public highway, pursuant to § 912 of the Public Lands Act. 43 U.S.C. § 912.

Defendants argue that, *inter alia*, no reversionary land interest in favor of plaintiffs ever vested because the ICC's aforementioned approval did not constitute a decree of abandonment of the rights-of-way by a court of competent jurisdiction or by act of Congress, as required

under the Public Lands Act. Moreover, defendants contend, even if Congress delegated to the ICC its authority to decree or declare abandonment, the ICC never so decreed or declared as to the rights-of-way in question.

The issues are simple to state but difficult to resolve. The Court considers first the threshold question of whether an abandonment of the Niles Canyon Road and Altamont Pass rights-of-way has actually occurred.

At the outset, the Court notes that while the rights-of-way were embraced in a public highway legally established, there has been no decree or declaration of abandonment by a court of competent jurisdiction or congressional act. Therefore, neither the exception nor the rule set forth in § 912 of the Public Lands Act applies, and plaintiffs are not entitled to any reversionary right, title, interest, or estate in the rights-of-way.

II

The Court previously ruled that § 912 applies with full force to land grants from Congress to the railroads of the type involved here.

Section 912 provides in pertinent part that:

> Whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad . . . and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and

> thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in [whomsoever shall lawfully hold title to the underlying land, or have obtained the interest of the United States' title in such land]. . . .

43 U.S.C. § 912.

For plaintiffs to prevail under § 912, the evidence must show that (1) Southern Pacific's use and occupancy of the rights-of-way for railroad purposes has ceased by forfeiture or by abandonment decreed or declared by a court or congressional act, and (2) the rights-of-way have not been embraced in a public highway legally established within one year of the aforementioned decree or declaration of forfeiture or abandonment.

The Court will first address the question of whether the rights-of-way were ever embraced in a public highway legally established.

A.

What constitutes a "highway" for purposes of the federal land grant statutes, i.e., § 912, is a question of state law. *See Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 250 (9th Cir.1974).

Plaintiffs contend that the rights-of-way were not embraced in a public highway legally established because the requirements of the California Environmental Quality Act ("CEQA"), were not satisfied. Cal.Pub.Res.Code

§ 21000 *et seq.* (1986). Defendants respond that the rights-of-way were embraced in a public highway legally established under both California common law and statutory law.

1.

California common law provides that where a county has been granted a right-of-way to be used for and devoted to the purposes only of a county road, the act of acceptance of the grant upon the part of the grantee county operates *ipso facto* to establish the right-of-way as a highway of the county. *Watson v. Greely*, 69 Cal.App. 643, 649, 232 P. 475 (1924). Moreover, state law holds that the grant and acceptance of the right-of-way constitutes a dedication of the strip to county road purposes. *Id.* No improvement of rights-of-way by a county is necessary to make them a highway. *Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 181 P. 658 (1919).

Southern Pacific agreed to quitclaim the rights-of-way at issue to the County on April 23, 1985, with the County's agreement that it would place the rights-of-way "into the County's highway system to be used for highway and/or transportation related facilities purposes thereafter." Plaintiffs' Trial Exh. No. 56 and Defendants' Trial Exh. No. B (Southern Pacific/County Agreement) at 1, ¶1.

On April 23, 1985, the County "accepted" Southern Pacific's rights-of-way; "declared" the rights-of-way "to be part of the County System of Highways"; and "designated" the Altamont rights-of-way to be "a part of the

Altamont Pass Transportation Corridor and/or County Road No. 8110," and the Niles Canyon rights-of-way to be "a part of Niles Canyon Transportation Corridor and/or County Road No. 8111." Defendants' Trial Exh. Nos. H and I, respectively (County Board Resolutions).

Based upon the foregoing evidence, Southern Pacific's grant of its rights-of-way to the County and the County's acceptance of them constituted an *ipso facto* establishment of a highway under California common law. *Watson, supra.*

2.

CEQA, on the other hand, requires that an Environmental Impact Report ("EIR") be prepared where the environment may be significantly affected by (1) an "intended" project, California Public Resources Code § 21151, or (2) a "proposed" project, *id.* at 21100. No EIR is required where it cannot be fairly argued on the basis of substantial evidence that a project may have significant environmental impact. *See Perley v. Board of Supervisors of Calaveras County,* 137 Cal.App.3d 424, 433 n. 4, 187 Cal.Rptr. 53 (1982).

A Negative Declaration was prepared in connection with the intended *acquisition* of Southern Pacific's rights-of-way and the *incorporation* of those rights-of-way into the County's highway system – *not* in connection with the *establishment* of a highway *as a highway.* Plaintiffs' Trial Exh. No. 69; Defendants' Trial Exh. No. L.

The Negative Declaration consists of a one-page cover sheet, initial study, checklist, area map, and location map. Paragraph "1" of the cover sheet refers to the "*acquisition*" of the rights-of-way, as does paragraph "IA." of the initial study. Paragraph "IF." of the initial study describes the project as follows: "Existing Southern Pacific Transportation company railroad right-of-way . . . to be *included* in the County system of Highways. . . ." (Emphasis added.) Moreover, the bottom right-hand corner of the checklist reads as follows:

> [T]he *opportunity for future public transportation* is being *preserved*. The *acquisition* is consistent with . . . policies to promote and protect forms of transportation which serve as an alternative to automobile use. The corridor will be *preserved* and *maintained* in the County System of Highways. *No physical changes* in the corridor are *contemplated at this time. Future changes, if any, will be reviewed in accordance with requirements of CEQA*.

(Emphasis added.)

Furthermore, the County represented in its memorandum in opposition to plaintiffs' petition for writ of mandate that:

> What the county in fact has approved is just the acts it already has taken: the *acceptance* of the donation of the rights-of-way from Southern Pacific and the *granting* of the easements to Southern Pacific. This of course means that when the county is prepared to adopt more specific plans for construction projects on the donated land, it will have to comply with CEQA's requirements before proceeding with those projects. . . . This is unequivocally

explained in the County's Initial Study upon which the Board of Supervisors adopted the Negative Declaration:

> No physical changes in the corridor are contemplated at this time. Future changes, if any, will be reviewed in accordance with the requirements of CEQA.

(Emphasis added.) County's Memorandum in Opposition to Plaintiff's Petition for Writ of Mandate, filed Aug. 2, 1985, at 8, 11. 11-26, 9, 11. 1-3.

Moreover, defendants' counsel told the Court at the October 4, 1985, hearing on the petition:

> The Negative Declaration . . . explain[s] that none of these legal transactions have had any physical effect on the . . . land, nor will they. . . . Future changes [to the corridor] . . . will be reviewed in accordance with . . . CEQA. . . . The County has never denied that before it . . . does any work on any highways here it has the obligation to comply with state environmental laws; and it fully intends to.

Reporter's Transcript, filed Dec. 18, 1985, p. 19, ll. 11-25.

Based upon the foregoing, it is clear that under the Negative Declaration, the *acquisition* and *incorporation* of the rights-of-way into the County's highway system as a "legally established highway" took place pursuant to the requirements of CEQA. What is equally clear is that CEQA only stands as a bar to the County's *future use*, if any, of the legally established highway *as a highway* until a Negative Declaration or an EIR is prepared that addresses such use. Thus, even under California statutory

law, the County embraced the rights-of-way in a public highway legally established.

B.

Because the rights-of-way were embraced in a public highway legally established, the Court turns to the question of whether such incorporation occurred within one year of the cessation of Southern Pacific's use and occupancy of the rights-of-way for railroad purposes by abandonment decreed or declared by a court or congressional act. The absence of cessation by forfeiture is not at issue and, as such, is not discussed.

1.

The determination of the issue of whether Southern Pacific abandoned the rights-of-way within one year of the aforementioned cessation is to be resolved in accordance with the procedure utilized in *Idaho v. Oregon Short Line Railroad Co.*, 617 F.Supp. 213 (D.C.Idaho 1985) (hereinafter *"Idaho II"*). Memorandum and Order, filed Mar. 2, 1987, at 5, ll. 17-19. The Court will consider the factors and type of evidence considered by the court in *Idaho*

II. Memorandum and Order at 11, ll. 19-21.

In *Idaho II*, the court paraphrased § 912 and then stated:

> As the Court reads § 912, the test regarding abandonment is that "use and occupancy" of the

> railroad right-of-way for railroad purposes must cease in order for abandonment to occur.

Idaho II 617 F.Supp. at 216. Upon concluding that neither the use nor the occupancy of the right-of-way in question had ceased and, thus, no abandonment had occurred, the court made the following partial declaration:

> 2. In order for abandonment . . . to occur in the future . . . the following must occur:
>
> a. The railroads must cease paying taxes;
>
> b. The railroads must take up the tracks and other railroad structures or the line must become completely unusable, even for side track purposes;
>
> c. The railroads must have the intent to abandon – as evidenced by statements and conduct;
>
> d. The railroads must cease using the line for any railroad purpose;
>
> e. This Court or Congress must decree that abandonment has occurred.

Id. at 218. In so declaring, the *Idaho II* court found that for there to be abandonment, there had to be (1) a cessation of use and occupancy, and (2) a decree by a court or Congress. The court did not reach the question of whether the ICC Certificate of Decision concerning the defendant railroads' abandonment[1] constituted the

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[1] The ICC certificate of abandonment contemplated, by its terms, that the railroad might choose not to proceed with "actual" abandonment, *Idaho v. Oregon Short Line Railroad Co.*, 617 F.Supp. 213, 217 (D.C.Idaho 1985) (hereinafter cited as "*Idaho II*").

requisite decree or declaration by a court or a congressional act.

In their post-trial submissions, the parties in the instant action argue that the first prong, i.e., the date of cessation of physical use and occupancy, is irrelevant and immaterial, while the second prong, i.e., the date of a decree or declaration by a court or a congressional act, is controlling.

However, as the discussion of the *Idaho II* decision indicates, both parties in this action are in error. In order for there to be abandonment under § 912, there must be (1) a cessation of use and occupancy; *and* (2) a decree by a court or a congressional act that abandonment has occurred. *Idaho II*, 617 F.Supp. at 216, 218. Because the parties' primary disagreement is as to whether there has been the requisite decree, it is that question that the Court will first address.

2.

Plaintiffs argue that the ICC's approval of Southern Pacific's "Notice of Exemption" for a relocation project, under which Southern Pacific would abandon its line, amounts to the requisite congressional decree of abandonment.

Southern Pacific filed its Notice of Exemption on August 18, 1982. Plaintiffs' Trial Exh. 44B. Therein, it

petitioned the ICC, pursuant to 49 U.S.C. § 10505,[2] for exemption from 49 U.S.C. §§ 10903-10907,[3] to allow it to abandon its railroad line.

The ICC prepared its Notice of Exemption on September 13, 1982. Therein, the ICC: (1) refers to Southern Pacific's Notice of Exemption; (2) cites the "relocation project" proposed by Southern Pacific and Western Pacific Railroad Company ("Western Pacific"); (3) states, "[u]nder the . . . project SPT will abandon its line . . . "; and (4) indicates that the "project involves not only an abandonment but a trackage rights transaction." Plaintiffs' Trial Exh. No. 44.

Based on the foregoing evidence, it appears that the ICC granted southern Pacific an exemption from abandonment requirements, 49 U.S.C. §§ 10903-10904, by referring to Southern Pacific's notice, which cited the abandonment procedure sections. Moreover, it appears

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[2] Section 10505 of Title 49 exempts a person from provisions of the interstate subtitle, i.e., §§ 10903-10907, when the provisions are (1) not necessary to carry out transportation policy, and (2) either (a) the transaction or service is of limited scope or (b) the application of provisions are not needed to protect shippers from the abuse of market power.

[3] Sections 10903-10907 of Title 49 pertain to (1) ICC's authorizing abandonment and discontinuance (§ 10903); (2) filing and procedure for applications to abandon or discontinue (§ 10904); (3) offers of financial assistance to avoid abandonment and discontinuance (§ 10905); (4) offering abandoned rail properties for sale for public purposes (§ 10906); and (5) exceptions (§ 10907).

that the ICC, in authorizing the exemption for the relocation project on September 13, 1982, authorized Southern Pacific's abandonment of its rights-of-way. 49 C.F.R. § 1180.4(g) (1986) at 518.

Plaintiffs, in arguing that the ICC's approval amounts to the requisite congressional act, rely upon the Supreme Court's pronouncement as to the power Congress has bestowed upon the ICC concerning the issue of abandonment, and cite the case of *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), which provides:

> Congress has power to assume not only some control, but paramount control, insofar as interstate commerce is involved. . . . The *authority to find* the facts and to exercise thereon the judgment whether *abandonment* is consistent with public convenience and necessity, *Congress conferred upon the Commission.*

Id. at 321, 101 S.Ct. at 1132 (emphasis added), *citing Colorado v. United States*, 271 U.S. 153, 165-66, 46 S.Ct. 452, 454-55, 70 L.Ed. 878 (1926). The Court continues:

> The exclusive and plenary nature of the *Commission's authority* to rule on carrier's *decisions to abandon* lines *is critical to the congressional scheme*, which contemplates comprehensive administrative regulation of interstate commerce. In deciding whether to permit an *abandonment*, the Commission must balance "the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other." . . . "The weight to be given to the cost of a relocated line as against the adverse effects upon those served by the abandoned line is a

> matter which the experience of the Commission qualifies it to decide. And, under the statute, it is *not a matter for judicial redecision.*"

Id. 450 U.S. at 321, 101 S.Ct. at 1132 (emphasis added), *citing Purcell v. United States*, 315 U.S. 381, 385, 62 S.Ct. 709, 711, 86 L.Ed. 910 (1942). Further, the Supreme Court in *Chicago & North Western* states:

> The *breadth of the Commission's statutory discretion suggests a congressional intent to limit judicial interference* with the agency's work. . . .
>
> . . . Congress granted to the Commission plenary authority to regulate . . . rail carriers' cessations of service on their lines. And *at least as to abandonments, this authority is exclusive.*

Id. 450 U.S. at 321-323, 101 S.Ct. at 1132-33 (emphasis added).

3.

Even assuming, *arguendo*, that the ICC's approval of Southern Pacific's "Notice of Exemption" did amount to the requisite congressional act, it is clear that plaintiffs are not entitled to any reversionary right, title, interest, or estate in the rights-of-ways. In this case, the other prong of the *Idaho II* interpretation of the requirements for abandonment under § 912, i.e., the cessation of use and occupancy, has not been met.

Faced with an absence of case law construing the terms "use," "occupancy," and "[railroad] purposes," the *Idaho II* court looked to the plain and apparent meaning of the terms, as well as the common law definition of

abandonment, in deciding whether the railroad's use and occupancy of the right-of-way in question had ceased. *Idaho II*, 617 F.Supp. at 217. Under both approaches, the court concluded that the railroad had not abandoned the right-of-way. *Id.* at 217-18.

Using the "plain and apparent meaning of the terms" approach, the court in *Idaho II* found that the railroad had continued to use the right-of-way where (1) the railroad continued to store not only 600-700 railroad cars awaiting repair, dismantling, sale, or further service, but also ties, rails, ballast, and fill, on portions of the right-of-way in question; and (2) the record showed that the line might be required to store even more cars to be used for some other purpose at some future time. Moreover, the *Idaho II* court also found that the railroad continued to occupy the right-of-way where (1) there had been no removal of trackage or other railroad structures along the line, and (2) the railroad had paid and continued to pay property taxes for the right-of-way.

Furthermore, under the common law test for abandonment,[4] which looks to (1) a present intent to abandon and (2) physical acts evidencing clear intent to relinquish

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[4] The court in *Idaho II*, 617 F.Supp. at 217, stated:

> The classic statement of the rule is that for abandonment to occur there must be (1) present intent to abandon, and (2) physical acts evidencing clear intent to relinquish the property interest. *See, e.g.*, J. CRIBBETT, *Principles of the Law of Property*, p. 345-46 (2d ed. 1975); *O'Brien v. Best*, 68 Idaho 348, 194 P.2d 608, 613 (1948).

the property interest, the court in *Idaho II* held that the requisite intent did not exist. The abandonment test enunciated in *Idaho II* is consistent with that which exists under California law.[5] The Court in *Idaho II* found it insufficient that (1) defendants contemplated, discussed or even made preliminary plans toward abandonment of the right-of-way; (2) defendants applied to the ICC for authorization to discontinue service on the right-of-way, in the event that the railroad chose to proceed with "actual" abandonment;[6] and (3) the railroad discontinued its services (though chose to convert the line to side track, which is a recognized use of railroad line). *Id.* at 217-18. The court also found that there were insufficient physical acts to constitute abandonment.

The court in *Idaho II* then went on to state that abandonment was generally found only where all or most of the following acts had occurred:

1. Railway service had been discontinued;

2. Trackage and other railroad structures had been removed;

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[5] The basic test of abandonment under California law is whether there is concurrent evidence of nonuse and a present intent to abandon. *See Cash v. Southern Pacific Railroad Co.*, 123 Cal.App.3d 974, 978, 177 Cal.Rptr. 474 (1981), *citing Wood v. Etiwanda Water Co.*, 147 Cal. 228, 234, 81 P. 512 (1905) ("The mere intention to abandon, if not coupled with yielding up possession or a cessation of user, is not sufficient; nor will the non-use alone, without an intention to abandon be held to amount to an abandonment.' "); *Faus v. City of Los Angeles*, 67 Cal.2d 350, 363, 62 Cal.Rptr. 193, 431 P.2d 849 (1967).

[6] *See* n. 1, *ante*.

3. Right-of-way had not been used for any railroad purpose;

4. Maintenance of the line had been discontinued.

Id. at 218. In contrast, the court explained, if some or all of the following occurred, abandonment generally was not found:

1. The railroad had paid taxes on the right-of-way;

2. The right-of-way was used for some railroad purpose even if railroad service had been discontinued;

3. Trackage was left intact along with other railroad structures such as bridges, ballast, and barricades. . . .

Id.

In this case, the evidence reveals a number of things.[7] First, it is clear that Southern Pacific paid taxes on the

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[7] Plaintiffs object to the introduction of exhibits and declarations, including those of the County and Southern Pacific, as hearsay. Plaintiffs contend that "the County's declarations are of individuals who have not been deposed, and who for which the plaintiffs have not had an opportunity of cross-examination." Plaintiffs' Submittal of Declarations re Evidence of Abandonment, filed Mar. 17, 1987, at p. 2, ll. 1-6. The Court overrules plaintiffs' objection, in light of the fact that plaintiffs were told during trial on March 4, 1987, to file counterexhibits and declarations if they deemed such to be appropriate, and that plaintiffs failed to do so. Moreover, the Court notes, as the following discussion indicates that some of plaintiffs' declarations submitted before trial contradict plaintiffs' own deposition testimony.

rights-of-way through March 31, 1985. Anton Ranuio[8] stated in his declaration that:

> 4. For the California property tax year 1984-1985 [3/31/84-3/31/85] Southern Pacific paid property taxes on the transferred rights-of-way as "Operating Property." For the California Property tax year 1985-1986 [3/31/85-3/31/86] Southern Pacific paid property taxes on its interest in the transferred rights-of-way as "Nonunitary" or "Nonoperating Property."

Declaration of Anton Ranuio Re Abandonment, filed Feb. 26, 1987, p. 2, ¶ 4.

Second, the rights-of-way were used for some railroad purpose, even if railroad service was discontinued. Kenneth B. Derr[9] declared in his declaration that:

> 4. The rights-of-way through Niles Canyon and Altamont were maintained and used by Southern Pacific as a secondary route into the Bay Area from the Central Valley. Additionally,

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[8] Ranuio is the Senior Manager of Property Accounting for Southern Pacific. Ranuio Declaration at 1, ¶ 1. He is responsible for the accurate recording in Southern Pacific's accounting records of investment and retirement costs of all roadway, facilities, and equipment of the company, as well as the preparation of Southern Pacific's property tax, reports for the states of California, Utah, and Nevada. *Id.*

[9] Derr is Office Engineer for the Western Division of Southern Pacific. Derr Declaration at 1. ¶ 1. His current responsibilities include overseeing all new design, construction, and leasing of property and the abandonment and retirement of tracks in the Western Division. *Id.* at ¶ 2. The tracks at issue in the Niles Canyon and Altamont Pass areas are located in the Western Division. *Id.* at 2, ¶ 2.

> they were used to serve local customers located along the rights-of-way.
>
> 5. Apart from temporary disruptions, the rights-of-way continuously served the roles described in the prior paragraph through March 1983. . . .
>
> 9. After March 1983, Southern Pacific used the section of track east of the damaged portion at approximately mileposts 56.6 and west of Tracy, between approximately mileposts 59 and 66.5, for the storage of box cars.

Declaration of Kenneth B. Derr Re Abandonment (hereinafter "Derr Declaration"), filed Feb. 26, 1987, at 2-3 ¶¶ 4-5, 4, ¶ 9. Furthermore, Lawrence M. Weller[10] stated in his declaration:

> 2. Between March and August 1985 training exercises were held by Southern Pacific to train employees as engineers and groundsmen. These training exercises involved the operation of engines and cars over the Southern Pacific tracks in the Altamont Pass area east of Ulmar and west of Tracy.
>
> * * *
>
> 5. During the months April through August 1985 I personally was present at the training exercises, and repeatedly saw and drove engines operating in the areas described above.

Declaration of Lawrence M. Weller Re Abandonment, filed Feb. 26, 1987, at 1-2, ¶¶ 2, 5.

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[10] Weller is Safety Officer for the Western and San Joaquin Division of Southern Pacific. Weller Declaration, at 1, ¶ 1.

The deposition testimony of plaintiff Robert A. Vieux, while in conflict with his declaration filed March 17, 1987,[11] tends to substantiate the foregoing declarations. Vieux stated at his deposition that the last time any sort of train went across the right-of-way on his property was "a year and a half ago [before December 1986] . . . [m]aybe two years [ago] [before December 1986]," i.e., between January 1985 and June 1985. Deposition of Robert Alfred Vieux (hereinafter "Vieux Deposition"), filed Jan. 21, 1987, at 19, ll. 15-19.

The deposition of plaintiff Joseph John Jess, while also inconsistent with his declaration filed March 17, 1987,[12] indicates that Southern Pacific placed cattle guards at the two points where fencing crossed the tracks in order to permit trains to move across his property without letting the cattle out in the summer of 1984 or 1985; and that the last time a Southern Pacific train crossed his property was "either last summer or the summer before," i.e., the summer of 1985 or 1986. Deposition

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[11] Vieux states in his declaration that "[f]rom and after March 1983, a train never traveled passed the wash-out to Tracy. In June 1986, the remainder of the tracks in the area [of our property] were removed and the right-of-way [was] graded." Vieux Declaration at 1-2, ¶ 3.

[12] Jess states in his declaration that from early 1983 on, he never saw any trains pass over the area where a slide occurred to Tracy because the slide prevented the right-of-way from being usable for trains. Jess Declaration at 1. ¶ 2. Jess also states, "[s]tarting in the last quarter of 1985, the tracks crossing my property began to be ripped out and the property graded. By May 1986, all tracks on my property were removed." *Id.* at 1-2, ¶ 3.

of Joseph John Jess (hereinafter "Jess Deposition"), filed Jan. 21, 1986, at 43-45, 50, ll. 11-22.

Third, the evidence shows that trackage was left intact along with other railroad structures. Plaintiff Ralph Pombo stated in his declaration that it was not until May 1986 that Southern Pacific ripped out the tracks remaining after the 1983 winter storm on the Altamont Pass rights-of-way. Declaration of Ralph Pombo in Support of Evidence of Abandonment, filed Mar. 17, 1987, at 1, ¶ 2. Plaintiff Vieux also stated at his deposition that the last permanent barriers to cross the rights-of-way coming into contact with his Altamont Pass property were Southern Pacific's tracks and ties, and that those barriers were not removed until August 1986. Vieux Deposition at 18, ll. 12-27. Plaintiff Jess also stated at his deposition that Southern Pacific's tracks and ties remained until "last summer sometime," i.e., summer 1986. Jess Deposition, at 13, ll. 8-12.

Fourth, Southern Pacific's statements and conduct did not reflect an intent to abandon the rights-of-way before the Southern Pacific and Western Pacific tracks were connected in April 1985. Southern Pacific's aforementioned ICC "Notice of Exemption" states: "SPT would not exercise its abandonment exemption authority, if granted, until and unless the SPT-WP trackage rights agreement had been approved by the Commission." Plaintiffs' Trial Exh. No. 44B at 3. Moreover, Derr stated in his declaration:

> 3. . . . Southern Pacific never contemplated ending its use of its tracks in the Niles

> Canyon and Altamont Pass areas until the connections were completed and the joint track operation agreement became effective.

Derr Declaration, at 2, ¶ 3.

Finally, the evidence shows that maintenance of the rights-of-way was not discontinued. Derr stated in his declaration that after the winter storms in 1983, during which Southern Pacific's Niles Canyon track was damaged, necessary repairs were timely made to return the track to regular service. *Id.* at 3. ¶ 7. Moreover, he stated that both before and after March 1983 the tracks in both the Niles Canyon and Altamont Pass areas continued to be inspected by Southern Pacific throughout their entire length. *Id.* at 3, ¶ 8. On occasion Derr performed the inspections, and, in doing so, he rode on the tracks in a "highrailing vehicle." *See id.* at 3-4, ¶ 8.

Based upon the foregoing, it is clear that there was no cessation of physical use and occupancy of the rights-of-way until April 1985, at the earliest, when Southern Pacific intended to discontinue its use and occupancy of the rights-of-way in connection with its relocation project. Even then, it can still be argued that there was no abandonment until after August 1985, when Southern Pacific completed its training exercises and ceased both its use and occupancy of the rights-of-way for the railroad and railroad structures. Thus, neither the exception nor the rule set forth in § 912 applies, and plaintiffs were not and are not entitled to any reversionary right, title, interest, or estate in the rights-of-way.

III

Plaintiffs claim under the federal Civil Rights Act that defendants' actions in concert violated their reversionary property rights, which were taken without due process of law or just compensation. *See* Plaintiffs' Trial Brief, filed Jan. 21, 1987, at 2, ¶ 1. Because the rights-of-way never became those of plaintiffs, their claim under § 1983, as well as their quiet title action, fails.

Moreover, plaintiffs contend that defendant Supervisors improperly diverted and wasted public funds and assets when the County agreed to: (1) indemnify and hold harmless Southern Pacific for any violation of plaintiffs' federal rights; (2) condemn a twenty-mile stretch of property for Southern Pacific's requested fiber optics easement at no cost to the railroad; and (3) indemnify Southern Pacific, at no cost to the railroad, for all losses in this action, if it were found that Southern Pacific's prior title claims were defective, or that Southern Pacific had violated plaintiffs' rights. *Id.* at 3, ¶ 4. Plaintiffs also seek declaratory and injunctive relief precluding the parties from violation of plaintiffs' rights, and federal and state law. *Id.* at 4, ¶ 5. Both these claims fail as well in light of the foregoing holding.

IV

In view of the evidence presented, and the discussion of the applicable authority, the Court finds that while the rights-of-way were embraced in a public highway legally established as of April 23, 1985, there has been no decree or declaration of abandonment by a court of competent

jurisdiction or a congressional act. Moreover, the Court finds that under either the "plain and apparent meaning" approach or the common law test of abandonment used in *Idaho II*, there was no cessation of use or occupancy of the rights-of-way until April 1985, at the earliest. As such, neither the exception nor the rule set forth in § 912 applies, and plaintiffs were not and are not entitled to any reversionary right, title, interest, or estate in the rights-of-way. Accordingly, based upon this finding, plaintiffs' additional claims fail.

The foregoing constitutes the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.

Defendants shall submit a judgment, approved as to form by plaintiffs, on or before October 6, 1987.
